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No. 2729

United States

Circuit Court of Appeals

For the Ninth Circuit.

ENNIS-BROWN COMPANY, a Corporation,
Appellant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed
MAR 6 - 1916
F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Northern District of the State of California.

IN EQUITY—(No. 88).

ENNIS-BROWN COMPANY, a Corporation,
Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation.
Defendants.

(Complaint in Equity.)

To the Honorable Judges of the District Court of the United States for the Northern District of the State of California, in Equity:

The complainant, Ennis-Brown Company, for cause of action against said defendants, alleges as follows:

I.

That complainant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California, and is, and at all times herein mentioned was, a resident and citizen of the State of California, in and for the Northern District thereof.

II.

That the defendant, Central Pacific Railway Company, is and was at all the times herein mentioned, a corporation organized and existing under the laws of the State of Utah, and a resident and citizen of said State of Utah.

III.

That the defendant, Southern Pacific Company is, and [1*] was at all times herein mentioned, a corporation, organized and existing under the laws of the State of Kentucky, and a resident and citizen of said State of Kentucky.

IV.

That complainant is, and at all the times herein mentioned was, the owner in fee simple absolute of, in and to the following described lands: All of that certain piece or parcel of land lying, situate and being in the city of Sacramento, county of Sacramento, State of California, particularly described as follows:

BEGINNING at a point on the Westerly line of Front Street two hundred and thirty-seven (237) feet South of a point where the Southerly line of J Street, if extended Westerly to the Westerly line of Front Street, would intersect the Westerly line of Front Street, running thence northerly along said Westerly line of Front Street two hundred and seventy-seven (277) feet, thence at right angles Westerly to the Sacramento River, thence southerly along the meanderings of said river to a point where a line drawn parallel with the Southerly line of J Street, if extended to the river and distant Southerly therefrom two hundred and thirty-seven (237) feet, would intersect said river, thence Easterly in a line parallel with the Southerly line of J Street to the place of beginning.

V.

That the value of the above-described premises is

*Page-number appearing at foot of page of original certified Record.

in excess of the sum of five thousand ($5,000) dollars.

VI.

That the defendants, and each of them, claim an estate or interest in and to the above-described real property adverse to complainant; that such claim is without right and that defendants have not, nor has either of them, any estate, right, title or interest in or to said real property or any part thereof; but said claim of said defendants, and each of them, is without right, legal or equitable.

VII.

That the defendant, Central Pacific Railway Company [2] is not in possession of the above-described premises, or any part thereof.

TO THE END, THEREFORE, that the said defendants may, if they can, show reason why complainant should not have relief, may it please your Honors to require said defendants, and each of them, to set out the source and nature of their claims, respectively, and that such claims, and each of them, be adjudged to be without right, legal or equitable, and of no force or effect, and that said defendants, and each of them, be perpetually enjoined from asserting any claim, estate, right or interest in or to said real property, or any part thereof; and complainant further prays for such other and further relief as the equities of the case may require and to your Honors may seem meet; and for costs of suit. And complainant will ever pray.

BURRELL G. WHITE,

Attorney for Complainant. [3]

[Verified. Filed June 27, 1914. [4]

Answer of Defendants.

Come now the above-named defendants and answer complainant's complaint as follows:

I.

Aver that the defendants are, and each of them is, without knowledge of the facts upon which the plaintiff relies as the basis of its alleged cause of action in equity.

II.

Deny that complainant is now, or at all, or at any of the times mentioned in the complaint, or at any other time, was, or is, or has been, the owner in fee simple absolute, or the owner of any interest, right, title or claim whatsoever in and to the lands described in paragraph IV of the complaint, or in or to any part of the said lands described in paragraph IV of the complaint; but, on the other hand, aver that the defendant Central Pacific Railway Company (a corporation), is the owner in fee simple absolute of all of the lands described in the complaint, and that it is in possession of the said lands through the defendant Southern Pacific Company, (a corporation), as its lessee, and that the said defendant Central Pacific Railway Company and its predecessors in interest have been [5] the owners in fee simple absolute, and in the possession of the said lands continuously for more than fifty years last past.

III.

Admit that the said defendants, and each of them, claim an estate or interest in and to the real property

described in the complaint, and that the said estate or interest of said defendant Central Pacific Railway Company, (a corporation), is a fee simple absolute, and that the said claim and interest and estate is adverse to the complainant, and that the said estate or interest of said defendant Southern Pacific Company (a corporation), is as lessee of said Central Pacific Railway Company, (a corporation), and that said claim and interest and estate is adverse to the complainant. Deny that such claim of said defendants, or either of them, is without right, or that the defendants, or either of them, have not any estate or right or title or interest in and to said real property, or any part thereof, or that the claim of said defendants, or either of them, is without right, either legal or equitable, or otherwise, but, on the contrary, these defendants aver that the claim of title of the said defendants, and each of them, is with right, both legal and equitable.

IV.

Deny that the defendant Central Pacific Railway Company is not in possession of the premises described in the complaint, or any part of said premises, but, on the other hand, aver that the said Central Pacific Railway Company is in possession of the said real property through the said defendant Southern Pacific Company by lease and agreement made by the predecessor in interest of the said Central Pacific Railway Company to the said Southern Pacific Company, and avers that the said defendant Southern Pacific Company [6] is in possession of the said real property, and every part thereof, claim-

ing under and by virtue of the said Central Pacific Railway Company, and claiming adversely against the said complainant, and all other persons, except the said Central Pacific Railway Company. Aver that the said Central Pacific Railway Company claims to be the owner in fee simple absolute of the said property, subject to the possession of the said Southern Pacific Company, under said lease and agreement hereinbefore referred to, and that the said Central Pacific Railway Company has acquired title to said real property from all persons, of every kind and description, who ever, at any time, had any right, title, claim or interest in and to the said property, or any part thereof.

For a further, separate and second defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 318 of the Code of Civil Procedure of the State of California.

For a further, separate and third defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 319 of the Code of Civil Procedure of the State of California.

For a further, separate and fourth defense herein the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 322 of the Code of Civil Procedure of the [7] State of California.

For a further, separate and fifth defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 323 of the Code of Civil Procedure of the State of California.

For a further, separate and sixth defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 325 of the Code of Civil Procedure of the State of California.

For a further, separate and seventh defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 326 of the Code of Civil Procedure of the State of California.

For a further, separate and eighth defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of subdivision 1, section 337 of the Code of Civil Procedure of the State of California.

For a further, separate and ninth defense herein, the said defendants aver as follows: [8]

I.

That the complainant's alleged cause of action is barred by the provisions of subdivision 1, section 338 of the Code of Civil Procedure of the State of California.

For a further, separate and tenth defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of subdivision 1, section 339 of the Code of Civil Procedure of the State of California.

For a further, separate and eleventh defense herein, the said defendants aver as follows:

I.

That the complainant's alleged cause of action is barred by the provisions of section 343 of the Code of Civil Procedure of the State of California. [9]

For a further, separate and twelfth defense to complainant's alleged cause of action, defendants aver:

I.

That in the year 1863, Central Pacific Railroad Company of California, a corporation formed, organized and existing under the laws of the State of California, and the predecessor in interest of the said defendants, entered into possession of the said real property and lands described in the complaint, and that it and its successors in interest, including these defendants, have ever since been in the actual and physical possession of the said real property and of the said lands, and during all of said time the said real property and lands have been, and are now, used by the said defendants and their predecessors in interest as a part of the railroad terminal of said defendants and their predecessors in interest in the city of Sacramento, county of Sacramento, State of Cali-

fornia, and that during all of said time the said real property and the said lands have been, and now are, part of the railroad system of Central Pacific Railway Company, (a corporation), and all of its predecessors in interest, and of Southern Pacific Company, under lease and agreement of the predecessor in interest of the said Central Pacific Railway Company.

II.

That the said Central Pacific Railroad Company of California and its successors in interest, ever since 1863, have, and the said defendants, as such successors, do now maintain upon said property, valuable and extensive railroad works and improvements and railroad tracks, and that now, and for many years last past, the said railroad works and improvements have, and do now, constitute a part of the railroad system of the said Central Pacific Railway Company, which runs from Ogden, in the State of Utah **[10]** through portions of the State of Utah, and through the State of Nevada, and through portions of the State of California, and over and through the property described in the complaint, and connected up by tracks with other property of other railroad corporations, and that ever since 1863 the said railroad tracks, works and improvements on the said real property described in the complaint have been, and now are, used and employed by the said defendants and their predecessors in interest, in interstate commerce, as well as intrastate commerce, by virtue of the fact that the said Central Pacific Railway Company, and its predecessors in interest, and the said Southern Pacific Company have been, and now

are, common carriers of freight and persons for hire.

III.

That ever since 1863 vast and large sums of money have been expended by the said defendants and their predecessors in interest, in constructing, maintaining and operating buildings and structures upon the said property, as a part of the said system. That a part of the said property is covered by the railroad freight sheds of the said defendants, and the balance of said property by railroad tracks and other improvements of the said defendants, all of which has been, during the said period of time, and now are, devoted to public use. That the said complainant, and its predecessors in interest, have stood by and permitted the said defendants, and their predecessors in interest, to expend large sums of money in the construction, maintenance and operation of the said improvements and railroad works and tracks, with the knowledge of the said defendants and their predecessors in interest claiming to own the said lands in fee simple absolute, and have never made any claim to the said defendants, or either of them, until the commencement of the present action, that the said complainant, or its predecessors [11] in interest, ever claimed any right, title, claim or interest in and to the said lands, or any part thereof. That the said complainant and its predecessors in interest have expressly and impliedly acquiesced in and consented to the entry of the said defendants and their predecessors in interest upon the lands described in the complaint, and in the construction, operation and maintenance of the said railroad

works and improvements and structures hereinbefore referred to, and for more than fifty years last past have never made any objection of hinderance thereto. That the railroad tracks over and through the lands described in the complaint are used, and have been for many years last past used, by the said defendants for the construction, operation and maintenance of the main line tracks, which connect and have connected, the city of Sacramento with the said railroad system and with other places in the State of California, and with cities and towns in other States of the United States. That the said property contains, and has for many years contained, other tracks, which are used, and are now being used, for switching and terminal purposes in the reception and delivery of freight in connection with the said railroad system, and along the east side of the said property described in the complaint, together with property adjoining the same on the north and south there is now, and has been, constructed and maintained by the said defendant, and their predecessors in interest, a large structure, known as the Sacramento Freight Sheds of the said defendants, and to the west thereof, during said time, have been located, and are now located, the tracks leading to and from the said freight sheds, as well as the main line tracks, and to the west thereof and bordering upon the Sacramento River, there have been, and during all of said time have been, maintained and operated by the said defendants, and their predecessors **[12]** in interest, wharves used by the said defendants and their predecessors in interest in connection with the said

railroad system, and as means of receiving and discharging freight to and from steamers, which constitute, and for many years last past has constituted, a part of the system of the said defendants in connection with the said railroad system. The said steamers, during all of said time, have and do now ply upon the Sacramento River in carrying freight to and from the city of Sacramento, and which is handled by the said defendants as a part of its railroad system, also as a part of its steamer system. That if the said complainant succeeds in establishing title to the said lands described in the complaint, or any part thereof, and obtains possession thereof, the railroad system of the said defendants, as well as the steamer system of the said defendants, will be interfered with and broken, and the said defendants prevented from carrying freight and passengers to and from the city of Sacramento to other points within the State of California, and to and from other States, and, thereby, great and irreparable public loss will be sustained. That for more than fifty years last past the said complainant and its predecessors in interest have stood silently by and permitted the system of the said defendants and its predecessors in interest to grow and expand, and the property described in the complaint to be used as a part of the said system, and large sums of money to be expended by the said defendants upon the faith thereof, and never, at any time, objected to the right of the said defendants and their predecessors in interest to use the said property, as a part of its railroad and

steamer system, but at all times consented and acquiesced in and to the use of the same by the said defendants and their predecessors in interest. Defendants, therefore, aver, in equity and good conscience, that the said complainant is now estopped to **[13]** claim any right, title, claim or interest in and to the property described in the complaint, or any part thereof. That the alleged cause of action in equity of said complainant is barred by its laches, and the laches of its predecessors in interest. That the alleged cause of action is stale and presents no equity. That the said complainant does not come into equity with clean hands. That prior to the commencement of the present action in equity, complainant, or its predecessors in interest, have never asserted any claim or title to the lands described in the complaint, or any part of such lands. That if the said complainant, or its predecessors, ever had any interest or estate in and to said property, the said defendants and their predecessors in interest could have acquired the same by law of the eminent domain, under the laws of the State of California, as each of the same is, and has been, ever since its organization, a steam railroad corporation, engaged in the business of a common carrier of persons and freight for hire. That all of the lands described in the complaint are necessary to the said public use in charge of the said defendants.

WHEREFORE, said defendants pray that complainant take nothing by this action, that the same may be dismissed, and that they may recover their costs of suit, and for such other. further and differ-

ent relief as the facts pleaded and proven will warrant and justify.

Dated September 4th, 1914.

E. J. FOULDS,
WM. H. DEVLIN,
ROBT. T. DEVLIN,
DEVLIN & DEVLIN,

Attorneys and Solicitors for Defendants. **[14]**

[Verified. Filed Sept. 5, 1914.] **[15]**

(Amended Bill.)

To the Honorable Judges of the District Court of the United States for the Northern District of the State of California, in Equity.

The complainant, Ennis-Brown Company, in pursuance of the order of the Court heretofore given and made herein, files this amended bill, and for cause of action against said defendants, alleges as follows:

I.

That complainant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California, and is, and at all times herein mentioned was, a resident and citizen of the State of California, and the Northern District thereof;

II.

That the defendant, Central Pacific Railway Company, is and was at all the times herein mentioned, a corporation, organized and existing under the laws of the State of Utah, and a resident and citizen of said State of Utah;

III.

That the defendant, Southern Pacific Company, is and was [16] at all the times herein mentioned, a corporation, organized and existing under the laws of the State of Kentucky, and a resident and citizen of said State of Kentucky;

IV.

That complainant is, and at all the times herein mentioned was, the owner in fee simple absolute of, in and to the following described lands: All of that certain piece or parcel of land, lying, situate and being in the city of Sacramento, county of Sacramento, State of California, particularly described as follows:

Beginning at a point on a line parallel with and eighty (80) feet West of the East line of Front Street two hundred and thirty-five (235) feet South of a point where the Southerly line of J Street if extended Westerly to said line would intersect said line; running thence Northerly in a line parallel with said East line of Front Street two hundred and seventy-five (275) feet; thence at right angles Westerly to the Sacramento River; running thence Southerly along the meanderings of said river to a point where a line drawn parallel with the Southerly line of J Street if extended to the Sacramento River and distant Southerly therefrom two hundred and thirty-five (235) feet would intersect said river; running thence Easterly in a line parallel with said Southerly line of J Street if extended as aforesaid to the place of beginning.

V.

That the value of the above-described premises is in excess of the sum of five thousand ($5,000) dollars;

VI.

That the defendants, and each of them, claim an estate or interest in and to the above-described real property adverse to complainant; that such claim is without right and that defendants have not, nor has either of them, any estate, right, title or interest in or to said real property or any part thereof; but said claim of said defendants, and each of them, is without right, legal or equitable; [17]

VII.

That the defendant, Central Pacific Railway Company, is not in possession of the above-described premises, or any part thereof;

VIII.

That the defendant, Southern Pacific Company, is now and at all times herein mentioned was, a public service corporation and as such corporation is now, and at all the times herein mentioned was, in possession of, and using the land hereinabove described.

TO THE END, THEREFORE, that the said defendants, may, if they can, show reason why complainant should not have relief, may it please your Honors to require said defendants, and each of them, to set out the source and nature of their claims respectively and that such claims, and each of them, be adjudged to be without right, legal or equitable, and of no force or effect, and that said defendants, and each of them, be perpetually enjoined from asserting any claim, estate, right or interest in or to said real

property, or any part thereof; and complainant further prays for such other and further relief as the equities of the case may require and to your Honors may seem meet; and for costs of suit. And complainant will ever pray.

BURRELL G. WHITE,
Attorney for Complainant. [18]

[Verified. Filed June 4, 1915.] [19]

Amendment [to Amended Bill].

Comes now the complainant and, with the consent of the Court first had and obtained and in response to the motion of defendants, filed herein, for a better statement and further and better particulars, makes and files the following amendment to and of its amended bill, the same to become and be paragraph IX thereof:

IX.

The defendants Southern Pacific Company and Central Pacific Railway Company are, and each of them is, engaged in the general business of railroad corporations as common carriers of passengers and freight, and said Southern Pacific Company maintains upon and over a portion of the property described in the amended bill filed herein a railroad main track over and upon which it operates trains in the exercise of its said business;

To prevent the maintenance and operations of said railroad track would interfere with the service of said defendant Southern Pacific Company to the general public in the city of Sacramento and in the county of Sacramento, and elsewhere;

On other portions of said property said Southern Pacific [20] Company maintains other railroad tracks which are switching tracks and a large structure known as the Sacramento Freight Sheds, and sheds used as a wharf bordering upon the Sacramento River. The public interest neither of the inhabitants of the city of Sacramento nor or the county of Sacramento, nor of any other community requires the maintenance of continuance of said last mentioned tracks or said sheds by said Southern Pacific Company. All of said tracks herein mentioned and sheds are used exclusively by the defendant Southern Pacific Company, and said company claims that as a public service corporation it is entitled to the continuous and exclusive use of said tracks, sheds and the land upon which the same are situated.

The four most important business streets in the city of Sacramento running toward the Sacramento River are I, J, K and L Streets; that said land is situated near the foot of said streets, borders upon the Sacramento River and, together with the land adjacent thereto, is the most convenient point for the shipment of freight into and from the city of Sacramento; that the commerce of the city of Sacramento by water is approximately one-half of the commerce of said city; that the public interest of the citizens of the city of Sacramento and of the county of Sacramento and thereabouts requires that said property should not be used exclusively by said defendant Southern Pacific Company; that the use of said property by said Southern Pacific Company is subordinate to the requirement of public interest that

the land upon which said sheds are built should be open to use by others than said defendant, Southern Pacific Company, and to the title and rights of the complainant therein and thereto.

BURRELL G. WHITE,
Attorney for Complainant. [21]

[Verified. Filed June 21, 1915.] [22]

(Stipulation and Order Extending Time to Answer.)

IT IS HEREBY STIPULATED AND AGREED that the defendants in the above-entitled action may have and they are hereby granted to and including the 1st day of September, A. D. 1914, within which to file answer to the complaint in said action.

This stipulation need not be filed.

Dated the 3d day of August, A. D. 1914.

BURRELL G. WHITE,
Attorney for Complainant.

So ordered.

Dated August 10th, 1914.

WM. C. VAN FLEET,
Judge.

[Filed August 10, 1914.] [23]

(Stipulation Extending Time to Answer.)

IT IS HEREBY STIPULATED that the above-named defendants may have to and including September 5th, 1914, in which to answer complainant's complaint in the above-entitled suit.

Dated August 27th, 1914.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed August 31, 1914.] [24]

At a stated term, to wit, the March term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 1st day of March, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Order Setting Suit for Trial.)

Ordered that the sixteen above-entitled causes be and the same are hereby set for trial on May 25, 1915, at Sacramento. [25]

Memorandum of Points and Authorities on Behalf of Defendant.

III.

The answer of the defendants, particularly the twelfth defense, shows that the defendants are in possession, and that the plaintiff is not. This, in itself, is sufficient in equity to constitute an action to quiet title in defendants in the Federal Court.

Baum v. Longwell, 200 Fed. 450.

[Filed October 30, 1914.] [26]

Notice of Motion to Transfer Cause to Law Side of the Court.

To the Complaint Above Named and Burrell G. White, Its Attorney:

You and each of you will please take notice that the defendant above named will, on Monday the 24th day of May, 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the courtroom of said court in the County Courthouse Building, of the County of Sacramento, State of California, at Sacramento, California, then and there move said Court to transfer said cause to the law side of the Court with such alterations in the pleadings as may be essential, pursuant to Equity Rule 22. Said motions will be based upon all of the pleadings, records and files herein, and upon this notice.

Dated this 19th day of May, 1915.

E. J. FOULD,
DEVLIN & DEVLIN,
Attorneys for Defendants.

Service of the within Notice is admitted this 19th day of May, 1915.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed May 20, 1915.] [27]

At a stated term, to wit, the April term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of Sacramento, on Wednesday, the 26th day of May, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

Order Granting Defendants' Motion to Transfer Cause to Law Side of Court.

Defendants' motion to transfer cause to the law side of court came on this day to be heard, and after argument by counsel for both sides was submitted to the Court for consideration and decision and the same being fully considered and the Court having rendered its opinion orally, it was, in accordance with said opinion, ordered that said motion be and the same is hereby granted, unless plaintiff file an amended bill of complaint within ten days. Further ordered that this suit be and the same is hereby continued for the term. [28]

Notice of Motion to Dismiss Action.

To the Above-named Complainant and Its Attorney:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that on Monday, the 21st day of June, 1915, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the court-room of the above-entitled court, in the United States

Postoffice Building at Seventy and Mission Streets, in the City and County of San Francisco, State of California, the said defendants, jointly and severally, will move the said Court to dismiss the above-entitled suit upon the following grounds:

I.

That the facts alleged are insufficient to constitute a valid cause of action in equity against the said defendants, or either of them.

II.

That the liability is not asserted against all of the material defendants, in this, that it appears from the amended complaint that the claim is made against the defendant Central Pacific Railway Company, that it has no title or interest in the property, and plaintiff against it seeks to have its claim thereto, quieted, while against the defendant Southern Pacific Company it is claimed that it is in possession of the property and that the plaintiff, therefore, [29] is entitled to damages upon the payment of which, when ascertained, the said defendant will be entitled to an interest in the property.

III.

That two causes of action are set forth, as hereinbefore stated, and it does not appear that there are sufficient grounds for the uniting of said two causes of action in one bill or complaint, in order to promote the convenient administration of justice.

IV.

Because it does not appear upon the face of the bill that the plaintiff was the owner in fee of the property

at the time the defendant Southern Pacific Company took possession.

Should the motion to dismiss the entire action be deemed too broad, then the said defendants, jointly and severally, will move the said Court to dismiss the alleged cause of action against the defendant Southern Pacific Company, on the ground that it does not appear that an action to quiet title will lie against it while in possession of the property and, further, that if the said plaintiff has any remedy at all it is an action at law for damages, and that it does not appear that the said plaintiff was the owner in fee simple, or in possession of the property at the time the said defendant Southern Pacific Company took possession of the said premises.

Upon the hearing of said motion, said defendants will rely upon the amended complaint and upon the records of said cause and the papers on file.

Dated June 12th, 1915.

E. J. FOULDS,
ROBT. T. DEVLIN and
WM. H. DEVLIN,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed June 15, 1915.] [30]

(Opinion) [Filed Dec. 1, 1915].

BURRELL G. WHITE, of San Francisco, for Complainant.

E. J. FOULDS, of San Francisco, and DEVLIN & DEVLIN, of Sacramento, for Defendants.

VAN FLEET, District Judge:

This is one of several actions (the numbers of which are in the margin) of a precisely similar character, commenced at the same time against these defendants, affecting the title to contiguous portions of the river front in the City of Sacramento. Excepting only as to the name of the plaintiff and the particular parcel of land involved, the bills are in all respects uniform in their averments, and a statement of the facts set forth in the instant bill will serve for all. In form the action is one to quiet title, and omitting the jurisdictional averments and description of property, the material facts set up in the amended bill are in substance these: [31]

That the complainant "is and at all the times herein mentioned was the owner in fee simple" of the property described, and that the defendants and each of them claim an estate or interest in such property adverse to the plaintiff, which claim is without right, and defendants have not, nor has either of them, any estate, right, title or interest in or to the property or any portion thereof; that the defendants are and each of them is engaged in the general business of railroad corporations as common carriers of passengers and freight; "that the defendant Central Pacific Railway Company is not in possession of the

premises involved or any part thereof," but the defendant Southern Pacific Company "is now and at all the times herein mentioned was in possession and using the land hereinabove described"; that it "maintains upon and over a portion of the property described in the amended bill herein a railroad main track, over and upon which it operates trains in the exercise of its said business" and "to prevent the maintenance and operation of said railroad track would interfere with the service of said defendant Southern Pacific Company to the general public"; that on the other portions of said property "said Southern Pacific Company maintains other railroad tracks which are switching tracks, and a large structure known as the Sacramento Freight Sheds, and sheds used as a wharf bordering upon the Sacramento River." It is then alleged that "the public interest neither of the inhabitants of the City of Sacramento nor of the County of Sacramento, nor of any other community, requires the maintenance or continuance of said last mentioned tracks or said sheds by said Southern Pacific Company. All of said tracks herein mentioned and sheds are used exclusively by the defendant Southern Pacific Company, and said company claims that, as a public service corporation, it is entitled to the continuous and exclusive [32] use of said tracks, sheds, and the land upon which the same are situated." Then follows an averment the materiality of which has not been suggested and is not perceived, as to the location of the property involved with reference to the main business streets of the City of Sacramento and its im-

portance, as a part of the waterfront for shipping purposes, in the commerce of the city, and "that the public interest of the citizens of the City of Sacramento and of the County of Sacramento and thereabouts requires that said property should not be used exclusively by said defendant Southern Pacific Company," but that such use "is subordinate to the requirement of the public interest that the land upon which said sheds are built should be open to use by others than said defendant."

The amended bill was filed in response to an order of the Court, made in each case on motion of defendants, directing that the cause be transferred to the law side unless plaintiff should so amend its bill as to disclose a cause of action cognizable in equity, the Court being of opinion that the original bill was lacking in that respect. The material changes in the bill in its amended form are the averments as to the character of the defendants as common carriers or public service corporations, the nature and purpose of the occupation of the premises by the defendant Southern Pacific Company, and the last averment of the bill above adverted to.

The defendants now move to dismiss the bill as amended on the ground that it fails to state a cause of action as against either defendant cognizable either in equity or at law; the objection as to the defendant Central Pacific Railway Company being that, while it is alleged that that defendant is not in possession of the premises in dispute, it appears that the Southern Pacific Company is in such possession, [33] and that an action to quiet title will not lie

unless the plaintiff is in possession or the defendants are out of possession; and as to the defendant Southern Pacific Company, (1) that, upon the facts alleged, an action to quiet title will not lie because that defendant is in possession; (2) that, being in possession as a public service corporation, the only remedy is for damages for the value of the property at the time it was taken; and (3) that the bill fails to disclose that plaintiff is the party entitled to maintain the latter form of action.

It may be remarked preliminarily that, while permissible under the statute of the State, it is not readily to be perceived from the face of the pleading why the two defendants are united in the same action. It will be at once observed that, upon the facts alleged, the case made against one is essentially different in its legal aspects from that against the other in that, while it is alleged that the defendant Southern Pacific Company is in possession of the premises in dispute, using them for its purposes as a public service corporation, it is alleged that the Central Pacific Railway Company is not in possession, and there is nothing in the bill tending to disclose any privity in estate right or claim as between the latter and its codefendant. It is true that, at the argument, the fact was adverted to and not controverted that the Southern Pacific Company is holding and operating the railroad tracks and structures occupying the premises, as the lessee of its codefendant; and if this fact were alleged the joining of the two would obviously be logical and proper, since the possession of the lessee would be that of the lessor. But the fact

is not alleged, and as it is not one of a character, however [34] notorious, of which the Court may take judicial cognizance, its existence cannot aid us in solving present questions, which must be determined from a consideration alone of the facts stated in the bill.

The motion must accordingly be disposed of upon the assumption that there is no such privity or community of interest between the two defendants.

So far, then, as the case made against the Central Pacific Railway Company is concerned, it may be somewhat briefly disposed of. While it is conceded by plaintiff that, being out of possession, the facts would not, under the general doctrine prevailing in the federal courts as to the requisites of a suit to quiet title, authorize it to there maintain an action of that impression, the theory upon which the bill proceeds as to this defendant is that the facts make a case falling within an exception to the general rule given recognition by the Supreme Court in Holland vs. Challen, 110 U. S. 15. That was an action brought in the Federal Court of Nebraska, under a local statute similar to the code provision of this State (C. C. P., sec. 738), authorizing an action in the nature of a suit to quiet title by one holding the legal title to land, whether in or out of possession, to have such title cleared of adverse claims. The bill disclosed that neither the plaintiff nor the defendant was in possession, but that the land was vacant, unoccupied and unimproved. Against the objection that the action could not be maintained, the Supreme Court held that it could, declaring in substance that,

while the State statute enlarged the right ordinarily existing in the Federal Courts to maintain such a suit, there was nothing in the facts to take the case out of the domain of equity as there [35] administered; that in an instance such as that presented by the bill, where both parties were out of possession, and the land vacant and unoccupied, no relief could be had at law, and as the settlement of such controversies and the improvement of the property resulting therefrom was desirable as conductive to the best interests of the state, there was no good reason why the federal courts should not entertain the suit and enforce the right given.

But the doctrine applied was confined strictly to instances where, as there, the premises involved were not held in possession adverse to the plaintiff, but were vacant and unoccupied, and where consequently the remedy afforded by the State statute would not trench upon the fundamental distinction controlling these courts as between actions at law and suits in equity; it being made plain that in any case where the law will afford a plain, adequate and complete remedy, equity will not, indeed, may not, take jurisdiction. Thus, the Court say:

> "No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity.

"It does not follow that by allowing in the federal courts a suit for relief under the statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title to or right of possession of real property when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking."

And this limitation of the effect of that case is definitely stated by the distinguished author of the opinion, in explaining [36] what is there held, in the later case of Whitehead vs. Shattuck, 138 U. S. 146, 155, where, after an extended comment upon the character of the former case and the principles there announced, he says:

"All that was thus said was applied simply to the case presented where neither party was in possession of the property. No word was expressed, intimating that suits of the kind could be maintained in the courts of the United States where the plaintiff had a plain, adequate and complete remedy at law; and such inference was specially guarded against."

A like construction is given the case by Mr. Justice

McKenna, then Circuit Judge, in Southern Pacific Co. vs. Goodrich, 57 Fed. 879, where, commenting upon Holland vs. Challen and Whitehead vs. Shattuck, he concludes:

> "These cases, therefore, must be held to establish that to sustain a suit in equity to quiet title in the federal courts, when the plaintiff is out of possession, the defendant must also be out of possession; in other words, the land must be unoccupied land."

It is quite apparent that that case can have no application to one like the present, where the disputed premises are not only held in adverse possession, but are fully occupied and improved; and that too, as we shall presently see, for a purpose which precludes such possession being disturbed.

As to the case of the defendant Southern Pacific Company. Ordinarily, where a defendant has taken possession of real property and is holding adversely to the owner of the legal title, the remedy of the latter is at law, in ejectment, for the possession and damages for the detention; and this constitutes a complete and adequate remedy. (Whitehead vs. Shattuck, *supra.*) But where the party in possession is holding and using the property in the character and for the purposes of a public utility—a servant of the public—and has established thereon and is operating instrumentalities to that end, then the remedy in ejectment will not lie, by reason of the interest of the public in having its service [37] uninterrupted. In such a case, if the owner has permitted his land to be taken possession of and devoted

to the purposes of a public service without first securing compensation, public policy demands that he be not permitted to oust the holder and retake his land, but that he be relegated to his remedy for the damages suffered through the invasion of his property. (Roberts vs. R. R. Co., 158 U. S. 10; Guernsey vs. No. Cal. Power Co., 160 Cal. 699; 2 Wood on Railroads, 994; Elliot on Railroads (2d ed.), sec. 1000.)

Plainiff recognizes the correctness of these principles in their general application, but his contention is that they do not control in a case where the circumstances are such as that the remedy at law is not full and complete, and this he conceives to be such a case. This is based upon the averment in the bill that the land taken and occupied by this defendant is more than its necessities as a public utility and the service of the public demand; and the contention is that plaintiff may invoke the aid of equity to inquire into the extent to which the land is being necessarily used for that purpose and restore to it such portions of the disputed premises as are not justly required therefor; that until such determination is had, there is no adequate basis upon which to fix the damages for the land necessarily employed in the service of the public; and that to require plaintiff to resort to an action for damages without such determination would compel the concession that all the land taken and occupied by the defendant is essential for its purposes as such utility. **[38]**

But this contention involves a misapprehension of the nature of the inquiry tendered by this feature of the bill. A little consideration will show, I think,

that the subject presents no real or substantial element of equitable cognizance. This will be perceived more readily by a comparison of the question here presented with that involved in the case of Stuart vs. U. P. R. R. Co., 178 Fed. 756, upon which plaintiff relies as presenting a controlling analogy. The bill in that case sought to quiet the plaintiff's title to a tract of one hundred and sixty acres of land patented to it by the Government, across which extended the right of way of the defendant railroad. Except as occupied by the defendant for the purposes of its right of way, the land was not in possession of either party. Plaintiff's bill asserted title to the entire tract, while the answer, not disclaiming as to the larger parcel, set up specifically title in defendant to a strip four hundred feet wide over the entire tract as a right of way claimed to have been granted it and its predecessor under the "Pacific Railroad Acts," so called; but the evidence, while disclosing a pronounced dispute as to the extent of the actual occupancy and use of the defendant, showed that it was confined to a width of one hundred feet,—fifty feet on either side of its track, which was fenced and improved and in the actual possession of defendant at the commencement of the action.

The lower Court dismissed the bill on the ground that plaintiff's remedy under the facts was at law for damages and not in equity. The Supreme Court reversed this ruling and in giving its reasons, said:

> "It is true, generally speaking, that in the courts of the United States, a suit to quiet title

cannot be maintained by a complainant who is not in possession against a defendant who is in possession; and this is so because there is a plain, complete and adequate remedy at law (citations). But it also is true that in [39] exceptional cases where there is no such remedy at law, the general rule does not apply. In our opinion, this is such a case. What really is the subject of the adverse claims of the parties is a strip four hundred feet in width along the appellee's railroad. Part of this is in the actual possession of the appellee, is occupied by permanent and costly railroad structures and is being used as a right of way for strictly railroad purposes. . . . In addition, there is a pronounced and *bona fide* dispute as to how much of the tract has been occupied and used as a right of way; the appellants insisting that this occupancy and use have been confined to twenty-five feet or less on either side of the central line of the railroad, and the appellee insisting that they have extended to fifty feet or more on either side. In these circumstances, it is apparent, as we think, that the appellants are entitled to a hearing and decision as to what extent the appellee is entitled to occupy and use the tract as a right of way; that they are not entitled to oust the appellee from its actual possession or to interrupt the operation of its railroad, and that their rights can be completely and adequately determined by a suit in equity in the nature of one to quiet title, but not otherwise.

> . . . There may be cases in which an action for compensation or damages under the statute would afford a plain, complete and adequate remedy; but this is not such a case, for in the absence of a prior determination of the dispute respecting the width of the strip actually occupied and used as a right of way, such an action could not be maintained without either conceding the greater occupancy and use asserted by the appellee, or risking a recovery of less than the actual damages. A remedy cannot be regarded as plain, complete and adequate when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits."

It will thus be seen that the sole ground upon which the case was held a proper one for equity was because of the dispute and uncertainty over the extent of the actual possession of the defendant and the limits of its right of way under the Congressional grant,—entirely proper subjects for equitable consideration, since, defendant not being in possession of the entire premises, until the extent of its possession was ascertained ejectment would not lie, and until the determination of the limits of its right of way, an action for damages would, for the reasons stated, have been inadequate as a remedy.

It will be readily perceived, however, that the present bill involves no such question as there considered. There is **[40]** no controversy here over the extent of the defendant's actual possession of the premises in dispute; that is alleged in the bill to extend to the entire parcel. What plaintiff claims, and

all that he claims, is that, although defendant is occupying and using the entire premises for its purposes as a common carrier, such occupancy and use are in excess to some extent not alleged of the actual necessities for railroad purposes; and he asks that a court of equity proceed to inquire and determine to what extent if any his property has thus been unnecessarily appropriated to a public use; in other words, to investigate and adjudicate as to how far the disputed premises are actually essential to the necessities of the defendant as a public service corporation in carrying on its railroad business with all its "necessary grounds for stations, buildings, workshops, and depots, machine-shops, switches, turntables, and water stations"; for these are all recognized as proper and necessary adjuncts to the business. (Stuart vs. Union Pac. R. Co., supra, 758.) Such an inquiry, if available to plaintiff in any form (Roberts vs. U. P. R. Co., *supra,* 12), is not and never was a subject of equitable cognizance. Plaintiff's rights as against this defendant are not in any respect different in kind, whatever the difference in form of remedy, than if defendant were seeking to take the property in the first instance for the use to which it is now being put. In such an action plaintiff would be entitled, under proper measure, to the damages he would suffer from the taking. Such an action would be in form one in eminent domain to condemn the property. That action has never been one of equitable cognizance, but is purely one at law. (Kohl vs. United States, 91 U. S. 367, 376.) As **[41]** there said:

> "The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court."

The same is true under the statute of this State; the action is at law and the parties have a right to have the damages assessed by a jury. The Court in such a case must determine whether the use to which it is sought to subject the property is one authorized by law and that the taking is necessary to such use (C. C. P., sec. 1241); which essentially includes the right to determine to what extent the proposed taking is necessary,—the precise question which plaintiff presents by the present bill. The bill merely shows that plaintiff has permitted his property to be taken without first requiring compensation. A public use having intervened for which his property is occupied, he cannot retake it, but must have recourse to his action for damages. Such an action is in legal effect the counterpart or complement of the action to condemn. It proceeds upon

the theory of an implied contract by defendant to pay for the land taken, or for damages for its taking, but in either form it is in its essential nature an action at law, pure and simple; and with complete jurisdiction in the court to determine the question of necessary extent of use,—if, as suggested, that question is now open to plaintiff's challenge.

This conclusion would send the case as to this defendant to the law side of the court but for one obstacle. There is no averment in the bill as to the date of defendant's taking **[42]** of the land, nor as to who was the owner of the legal title at the time of such taking. It is settled that the right of action for damages in such an instance is in the party holding the title at the time of the original wrongful entry. (Roberts vs. No. Pac. R. R., *supra;* Stone vs. Waukegan, 205 Fed. 495; Kindred vs. U. P. R. R. Co., 225 U. S. 582.)

There is, therefore, a failure to state any cause of action in favor of the present plaintiff. This being so, in view of what has been said, the bill must be dismissed as to both defendants. A like order will be entered in each of the cases the numbers of which are above given.

[Filed Dec. 1, 1915.] **[43]**

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Wednesday, the 1st day of December, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Order Granting Defendants' Motion to Dismiss.)

Defendants' motion to dismiss the amended bill, heretofore heard and submitted, being now fully considered, and the Court having filed its opinion thereon, it was ordered that said motion be and the same is hereby granted. **[44]**

Order Taking Amended Bill and Amendment to the Amended Bill Pro Confesso.

In this cause the defendants and each of them having answered, and thereafter the complainant having filed an amended bill and an amendment of and to the bill, and the defendants and each of them having failed to file herein a new or supplemental answer within the time allowed by Rule 32 of Rules of Practice for the Courts of Equity, and the time for filing a new or supplemental answer herein as allowed by said rules having expired.

Now, upon application of Burrell G. White, Esq., attorney for complainant, it is hereby ordered that the bill of complaint as amended herein be and the

same is hereby taken *pro confesso* against said defendants and each of them.

Entered December 15, 1915.

WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. **[45]**

(Notice of Motion to Set Aside Order Taking Amended Bill Pro Confesso.)

To the Complainant Above Named, and Burrell G. White, Its Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the defendants above named will, on Monday, the 20th day of December, 1915, at ten o'clock A. M., or as soon thereafter as counsel can be heard in the courtroom of said court, in the new Courthouse and Postoffice Building at Seventh and Mission Streets, San Francisco, California, move said court to set aside, vacate and rescind the order entered herein by the clerk upon the application of complainant on December 15th, 1915, taking the amended bill *pro confesso* against said defendants;

Said motion will be made upon the pleadings, records and files in this case, and upon the ground that said cause of action had already been dismissed by the Court at the time such application by complainant was made, and upon the further ground that said defendants have never been in default therein.

Dated December 16th, 1915.

DEVLIN & DEVLIN,
E. J. FOULDS,
Attorneys for Defendants.

Service of the within Notice is admitted this 17th day of December, 1915.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed Dec. 17, 1915.] [46]

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 20th day of December, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Order Granting Motion to Vacate and Rescind Order Taking Amended Bill Pro Confesso, etc.)

Defendants' motion to vacate and rescind the order heretofore made by the clerk on the 15th day of December, 1915, taking the amended bill herein *pro confesso* having been argued and fully considered, and it appearing that said order was inadvertently and inadvisedly made, it is hereby ordered that the said motion be and it is hereby granted.

Upon application of defendants, it is hereby or-

dered that a formal decree dismissing said cause be made and entered herein.

It is further ordered that complainants motion to consolidate this case, with the 15 similar cases numbers 89, 90, 91, 92, 93, 94, 95, 101, 102, 103, 126, 127, 128, 129 and 130 for the purposes of appeal be and the same is hereby granted for said purpose defendants exception to this order being noted and allowed. [47]

(Notice of Motion to Consolidate.)

To the Defendants Named in the Above-entitled Suit, and to E. J. Foulds and Devlin & Devlin, Attorneys for said Defendants:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the complainant in the above-entitled suit will on Monday, the 20th day of December, 1915, at ten o'clock A. M. or as soon thereafter as counsel can be heard in the courtroom of the above-named court in the new courthouse and Postoffice building at Seventh and Mission Streets, San Francisco, California, move said Court to consolidate the above-entitled suit and similar suits in equity, numbers 89, 90, 91, 92, 93, 94, 95, 101, 102, 103, 126, 127, 128, 129, and 130 for the purpose of all further proceedings herein and in said other fifteen similar suits;

Said motion will be made upon the pleadings, records and files in this suit and said other suits, and upon the ground that the consolidation of said suits is in the interest of the convenient administration of justice and disposition of said suits.

Dated December 18th, 1915.

BURRELL G. WHITE,

Attorney for Complainant in each and all of said Suits.

Service of the within Notice of Motion to Consolidate is admitted this 18th day of December, 1915, and all objection to time of service of said Notice of Motion is hereby waived.

DEVLIN & DEVLIN and
E. J. FOULDS,
Attorneys for Defendants.

[Filed December 20, 1915.] [48]

At a stated term, to wit, the November term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 20th day of December, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 88—IN EQUITY.

ENNIS-BROWN COMPANY, a Corporation,
Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,
Defendants.

Decree.

The Court having heretofore, on the 1st day of December, 1915, on defendants' motion, made its order dismissing the amended bill in the above-entitled cause as not stating a cause of action, but allowing the complainant ten days after the date of said order in which to amend, if so advised, and notice of said order having been duly given, and the said complainant having declined to amend its said amended bill within said time or at all;

Now, on motion of the defendants, it is ordered and adjudged that the above and foregoing cause be, and the same is, hereby dismissed, and that the said defendants do have and recover their costs of suit against the said complainant, taxed at the sum of $18.80.

WM. C. VAN FLEET,
Judge.

[Filed and entered December 22, 1915.] [49]

Notice of Motion for Further and Better Particulars.

To the defendants Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, and E. J. Foulds, William H. Devlin, Robert T. Devlin and Devlin and Devlin, Attorneys for Defendants.

YOU AND EACH OF YOU WILL PLEASE HEREBY TAKE NOTICE that complainant above named will, on Monday, the 16th day of November, 1914, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the courtroom, of Department 2,

of the above-entitled court, in the new courthouse and Postoffice building, Seventh and Mission Streets, San Francisco, California, move the said Court for an order directing the defendants to file herein further and better particulars of the entry of the Central Pacific Railroad Company of California, a corporation, upon the real property and lands described in the complaint filed herein, alleged in said answer on page 6, 2d paragraph thereof, to have been made by said Central Pacific Railroad Company of California in the year 1863; under what claim of right said entry was made; under what instrument or instruments, if any, said entry was made; and under what instrument or instruments, if any, possession of said lands has been held; [50]

To file herein a further and better statement of the nature of their claim to the title of the property described in the complaint, filed herein, made in answer to said complaint; what created the alleged rights of defendants, and upon what instrument of instruments their claims are based.

Said motion will be based upon said answer and all papers on file herein, and upon this notice, and will be made upon the ground that said parts of said answer are uncertain, indefinite and evasive.

Dated November 10th, 1914.

BURRELL G. WHITE,
Attorney for Complainant.

Due service and receipt of copy of the within No-

tice this 10th day of November, 1914, are hereby admitted.

E. J. FOULDS,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed November 11, 1914.] [51]

At a stated term, to wit, the November term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 23d day of December, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

(Order Denying Complainant's Motion for Further and Better Particulars.)

Plaintiff's motion for further and better particulars in answer, heretofore heard and submitted, being now fully considered and the Court having filed its opinion thereon, it was ordered that said motion be and the same is hereby denied. [52]

Memorandum of Points and Authorities upon Plaintiff's Motion for Further and Better Particulars.

Plaintiff relies upon the points and authorities submitted in similar cases pending herein, and for the purpose of presentng the same to the Court attaches, and makes a part hereof, a copy of such points and

authorities as were filed in re. John Breuner Company against Central Pacific Railway Company, et al., Equity Suit No. 130.

Plaintiff and the several plaintiffs in the similar suits pending herein against the same defendants, hereby offer to file herein such further particulars as the defendants may demand as to the basis of their several causes of action, against the defendants, filed herein.

Respectfully submitted,
BURRELL G. WHITE,
Attorney for Complainant.

Filed March 1, 1915.] [53]

(Petition for Allowance of Appeal.)

Now comes Ennis-Brown Company a corporation, complainant above-named, and conceiving itself aggrieved by the order and decree of the above-entitle court made and entered by said court in the above-entitled suit on the 20th day of December, 1915, wherein and whereby it was ordered and adjudged that said suit be dismissed, and whereby said suit was dismissed; it hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors filed herein and herewith, and petitions of said Court to allow said complainant to prosecute an appeal to said United States Circuit Court of Appeals, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of bond

which said complainant shall give and furnish upon said appeal, and that a transcript of the record, including the papers and proceedings upon which said order and decree were made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

Dated December 23d, 1915.

BURRELL G. WHITE,

Solicitor for Appellant and Complainant. [54]

Receipt of a copy of the within Petition for Allowance of Appeal is hereby admitted this 23d day of December, 1915.

DEVLIN & DEVLIN,
E. J. FOULDS.

[Filed December 23, 1915.] [55]

(Assignment of Errors on Appeal.)

Now comes Ennis-Brown Company, a corporation, complainant in the above-entitled suit, and by its solicitor says that in the record, the proceedings and decree made and entered in this suit on the 20th day of December, 1915, wherein and whereby it was ordered and adjudged that said suit be dismissed, and whereby said suit was dismissed, there is manifest error in that the said complainant has been denied its just rights by the above-named District Court, and the said complainant hereby assigns and sets out separately and particularly the following errors, viz:

I.

The said Court erred, in granting defendants' motion to dismiss the amended bill of complaint herein on December 1st, 1915, by holding and deciding that

said amended bill did not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court.

II.

The said Court erred, in granting said motion, by holding and deciding that the defendant Central Pacific Railway Company [56] was not properly joined as a defendant herein with the defendant Southern Pacific Company.

III.

The said Court erred in granting said motion by holding and deciding that complainant, while out of possession, could not maintain herein its suit to quiet its title against the defendant Central Pacific Railway Company, while out of possession and while the land involved was occupied.

IV.

The said Court erred in granting said motion by holding and deciding that said amended bill of complaint did not state facts sufficient to entitle complainant to maintain its suit herein to quiet title against defendant Southern Pacific Company while in possession.

V.

The said Court erred in granting said motion by holding and deciding that the amended bill of complaint showed that complainant had a plain, complete and adequate remedy in the action at law in damages.

VI.

The said Court erred in ordering and adjudging the dismissal of said suit on the 20th day of December, 1915, in that said amended bill of complaint stated

and does state facts sufficient to constitute a valid cause of action against said defendants of cognizance in equity in this court.

VII.

The said Court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court. [57]

VIII.

The said Court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court agaist the defedant Central Pacific Railway Company.

IX.

The said Court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court against defendant Southern Pacific Company.

X.

The said Court erred in making said decree dismissing said suit in that it is not stated in said decree that the dismissal of said suit is without prejudice to an action at law.

XI.

The said Court erred in not ordering said suit transferred to the law side of said court if said amended bill did not and does not state a cause of ac-

tion of cognizance in equity in this court.

XII.

The said Court erred in granting motion to transfer to the law side of the court on May 28th, 1915, unless complainant should file an amended bill, by holding and deciding that the bill aided by the answer then on file did not state facts sufficient to constitute a cause of action in equity to quiet title, cognizable in this court.

XIII.

The said Court erred in holding and deciding on the 28th day of May, 1915, that the bill of complaint aided by the [58] answer then on file did not contain facts sufficient to constitute a cause of action cognizant in equity in this court against the defendants or either of them.

XIV.

The said Court erred in holding and deciding on the 28th day of May, 1915, that the answer then on file did not state facts sufficient to constitute a cause of action to quiet title against complainant in equity in his court.

XV.

The said Court erred in holding and deciding on the 28th day of May, 1915, that the answer then on file did not state facts sufficient to constitute a valid cause of action in equity against complainant by defendants.

XVI.

The said Court erred in denying the complainant's motion for a statement of further and better particulars as to the matters set out in complainant's

notice of motion for such statement, contained in the transcript of record of this suit on appeal.

XVII.

The said Court erred in holding and deciding that defendants had not on May 28th, 1915, submitted to the jurisdiction of this Court in equity in this suit and by refusing to hold that said defendants had waived their right, if any they or either of them ever had, to object to the jurisdiction of this court in equity in this suit.

XVIII.

The said Court erred in holding and deciding that the defendants had not on December 1st, 1915, submitted to the jurisdiction of this Court in equity in this suit, and by refusing to hold and decide that said defendants had waived their right, [59] if any they or either of them ever had, to object to the jurisdiction of this Court in equity in this suit.

XIX.

The said Court erred in granting defendants' motion to vacate, set aside and rescind the order for a decree *pro confesso*, in favor of complainant, entered herein on December 15th, 1915, by holding and deciding that said order had been inadvertently and inadvisedly entered.

XX.

The said Court erred in vacating, setting aside and rescinding the order for a decree *pro confesso*, in favor of complainant, entered herein on December 15th, 1915, by holding and deciding that the defendants were not and that neither of them was in default

for failure to file a new or supplemental answer herein.

XXI.

The said Court erred in setting aside, vacating and rescinding said order for a decree *pro confesso,* on December 20th, 1915, by refusing to hold and decide that the defendants were and each of them was in default for failure to answer the amended bill herein.

XXII.

The said Court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute any valid cause of action at all.

WHEREFORE, said complainant, Ennis-Brown Company, a corporation, prays that the order and decree of the above-entitled court, made and entered on said 20th day of December, 1915, and all other orders, in the making of which error is herein assigned, be reversed, and for such other relief, orders [60] and decrees as the complainant is entitled to in equity.

BURRELL G. WHITE,
Solicitor for Complainant.

Receipt of a copy of the within Assignment of Errors on Appeal is hereby admitted this 23d day of December, 1915.

DEVLIN & DEVLIN.
E. J. FOULDS.

[Filed December 23, 1915.] [61]

(Order Permitting an Appeal and Fixing Amount of Cost Bond on Appeal.)

WHEREAS, in the District Court of the United States, Ninth Circuit, Northern District of California, on the 20th day of December, 1915, a decree was made and entered in the above-entitled cause, wherein and whereby it was ordered and adjudged that the above-entitled suit be dismissed, and wherein and whereby said suit was dismissed; and

WHEREAS, Ennis-Brown Company, a corporation, complainant in said cause has on this 23d day of December, 1915, filed its petition for the allowance of an appeal from said order to the United States Circuit Court of Appeals, Ninth Circuit, together with an asignment of errors, in and by which said petition it has prayed that an order be made fixing the amount of the cost bond which it shall give and furnish on said appeal:

Now, therefore, in consideration of the premises, and good cause appearing therefor, it is ORDERED that said appeal be, and the same is hereby permitted and allowed, in which said Ennis-Brown Company, a corporation, are appellants and Central Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are appellees. [62]

It is further ORDERED that the said Ennis-Brown Company, a corporation, complainant herein, shall file its undertaking and cost bond in form and substance conditioned with sureties in accordance with the provisions of the law and the rules and practice of this court in the said United States Dis-

trict Court in the sum of five hundred ($500) dollars, which said bond and sureties thereon shall be approved by a Judge of this court before filed, and said amount is hereby fixed as the amount of said bond.

Dated December 23d, 1915.

WM. C. VAN FLEET,
Judge of United States District Court.

[Filed December 23, 1915.] [63]

(Bond on Appeal.)

KNOW ALL MEN BY THESE PRESENT: That we, Ennis-Brown Company, a corporation, as principal, and Dwight H. Miller and Scott F. Ennis as sureties, are held and firmly bound unto the Central Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, in the full amount of Five Hundred ($500) Dollars to be paid to the said Central Pacific Railway Company and Southern Pacific Company, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, successors, representatives and assigns firmly by these presents.

Sealed with our seals, and dated this 24th day of December, 1915.

WHEREAS, the above-named complainant, Ennis-Brown Company, a corporation, has obtained from the District Court of the United States, Northern District of California, its order allowing said complainant to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, to

reverse an order and decree made and entered in the above-entitled suit, wherein and whereby it was ordered and adjudged that said suit be [64] dismissed; and wherein and whereby said suit was dismissed;

Now, therefore, the condition of this obligation is such that if the above-named complainant, Ennis-Brown Company, a corporation, shall prosecute such appeal to effect, and answer all costs if it shall fail to make good said plea, then this obligation shall be void; otherwise, to remain in full force and effect.

IN WITNESS WHEREOF, said Ennis-Brown Company, a corporation, has caused these presents to be executed by its secretary thereunto duly authorized, and its corporate seal to be hereunto affixed, and said sureties have hereunto subscribed their names this 24th day of December, 1915.

ENNIS-BROWN CO.
By SCOTT F. ENNIS,
Secretary.
DWIGHT H. MILLER.
SCOTT F. ENNIS.

State of California,
County of Sacramento,—ss.

Dwight H. Miller and Scott F. Ennis, being sworn, each for himself, says that he is one of the sureties named in the above undertaking; that he is a resident and freeholder within the State of California and that he is worth the sum in the said undertaking specified over and above all his just debts and liabili-

ties exclusive of property exempt from execution.

DWIGHT H. MILLER.
SCOTT F. ENNIS.

Subscribed and sworn to before me this 24th day of December, 1915.

[Seal] CLINTON E. HARBER,
Notary Public in and for the County of Sacramento, State of California. [65]

State of California,
County of Sacramento,—ss.

On this twenty-fourth day of December, 1915, before me, Clinton E. Harber, a Notary Public in and for said county of Sacramento, duly commissioned and sworn, personally appeared Scott F. Ennis, known to me to be the secretary of the corporation that executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, at my office in the county of Sacramento, the day and year in this certificate first above written.

[Seal] CLINTON E. HARBER,
Notary Public in and for said Sacramento County, State of California.

State of California,
County of Sacramento,—ss.

On this twenty-fourth day of December, in the year one thousand nine hundred and fifteen, before me, Clinton E. Harber, a notary public in and for the county of Sacramento, duly commissioned and

sworn, personally appeared Dwight H. Miller and Scott F. Ennis known to me to be the persons whose names are subscribed to the within instrument, and they duly acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] CLINTON E. HARBER,
Notary Public in and for the County of Sacramento, State of California.

The foregoing bond and the sureties mentioned therein are hereby approved this 27th day of December, 1915.

WM. C. VAN FLEET,
Judge.

[Filed December 27, 1915.] [66]

(Complainant's Praecipe for Transcript of Record on Appeal.)

To the Clerk of the Above-entitled Court:

You will please issue and prepare a transcript of record on appeal, by complainant in the above-entitled suit, to be filed in the office of the clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under an appeal perfected to said court in said suit, and include in said transcript copy of the following pleadings, papers, records and proceedings, to wit:

(1) Bill of complaint.
(2) Answer of defendants.
(3) Amended bill of complaint.

(4) Amendment to and of the amended bill.

(5) Stipulation and order extending time to answer, filed August 10th, 1914.

(6) Stipulation and order extending time to answer, filed August 31st, 1914.

(7) Minute order setting suit for trial made and entered March 1st, 1915. [67]

(8) Paragraph III of memorandum of points and authorities filed herein on 30th day of October, 1914, in consolidated suit No. 101 on behalf of defendants.

(9) Defendants' notice of motion to transfer from the equity side to the law side of the above-entitled court, filed May 20th, 1915.

(10) Order made May 28th, 1915, granting defendants' motion to transfer to law side of the court.

(11) Defendants' notice of motion to dismiss.

(12) Opinion of Court on defendants' motion to dismiss.

(13) Order dated December 1st, 1915, granting defendants' motion to dismiss.

(14) Order for a decree *pro confesso* entered December 15th, 1915.

(15) Notice of motion to vacate, set aside and rescind order for a decree *pro confesso*.

(16) Order granting motion to vacate, set aside and rescind order for a decree *pro confesso*.

(17) Motion to consolidate suits made December 20th, 1915.

(18) Order made December 20th, 1915, consolidating suits.

(19) Order and decree made and entered Decem-

ber 20th, 1915, granting defendants' motion to dismiss, and dismissing suit.

(20) Complainant's notice of motion for further and better particulars.

(21) Order of December 23d, 1914, denying complainant's motion for further and better particulars.

(22) Complainant's offer to file such particulars as to its claim of ownership of defendants might demand, filed March 1st, 1915, in companion suit No. 102.

(23) Petition for order allowing appeal.

(24) Assignment of errors. [68]

(25) Order allowing appeal and fixing bond.

(26) Bond on appeal.

(27) Complainant's praecipe for transcript of record.

(28) Citation on appeal.

(29) That portion of affidavit of Burrell G. White filed in consolidated suit No. 101 on November 18th, 1915, beginning with line 30, page 1, and ending with line 12, page 4 thereof, showing endorsements on back thereof; and all other papers which complainant shall file herein in prosecution of or upon its said appeal.

Dated December 23d, 1915.

BURRELL G. WHITE,
Solicitor for Complainant.

Receipt of a copy of the within complainant's praecipe for transcript of record on appeal is hereby admitted this 23d day of December, 1915.

DEVLIN & DEVLIN.
E. J. FOULDS.

[Filed December 23, 1915.] [69]

(Order Denying Motion to Strike Out Parts of Answer and Granting Motion for Further and Better Particulars of Answer.)

BURRELL, G. WHITE, Esq., Attorney for Complainant.

DEVLIN & DEVLIN and E. J. FOULDS, Attorneys for Defendants.

The motion to strike out parts of answer herein is denied.

The motion for further and better particulars as to the twelfth defense set up in defendants' answer is granted, and defendants are directed to file herein such further and better particulars regarding the nature of their entry upon the land in question, under what claim or right, if any, such entry was made; under what instrument or instruments in writing, if any, such entry was made, and under what instrument or instruments, if any, possession of said lands has been held.

October 30th, 1914.

M. T. DOOLING,
Judge.

[Filed October 30, 1914.] [75]

Stipulation (and Order Extending Time to File Amended Answer).

IT IS HEREBY STIPULATED that the above-named defendants may have to and including the 25th day of November, 1914, in which to amend their answer, or to file an amended answer, required by

the order of the Court made on October 30th, 1914.

DATED November 4th, 1914.

BURRELL G. WHITE,
Attorney and Solicitor for Complainant.

SO ORDERED this 10th day of November, 1914.

WM. C. VAN FLEET,
Judge.

[Filed November 10, 1914.] **[76]**

(Opinion and Order Denying Motion for Further and Better Particulars in Answer.)

BURRELL G. WHITE, Esq., Attorney for Complainant.

DEVLIN & DEVLIN, Attorneys for Defendants.

While I held in the case of Curtis vs. Central Pacific Railway Company, et al. (Equity 101), that plaintiff's motion for further and better particulars as to the twelfth defense set up in the answer should be granted, upon further argument and consideration I am convinced that defendants are entitled to rest upon the defense as therein set forth. The reason, though not expressed, upon which the order in Case 101 was based was, that notwithstanding anything set out in this defense the entry and possession therein relied upon may have been under lease or agreement with plaintiff or his predecessors in interest. But even if this be true it is within the knowledge of plaintiff, and does not render the defense as such less a defense *pro tanto* to the action to quiet title. Possession is alleged therein, and it is con-

ceded that if such possession is established plaintiff must fail. The motion for further and better particulars is therefore denied.

M. T. DOOLING,
Judge.

December 23d, 1914.

[Filed December 23, 1914.] [88].

Notice of Motion for Further and Better Particulars.

To the Defendants Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, and E. J. Foulds, William H. Devlin, Robert T. Devlin and Devlin and Devlin, Attorneys for Defendants:

YOU AND EACH OF YOU WILL PLEASE HEREBY TAKE NOTICE that complainant above named will, on Monday, the 1st day of February, 1915, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in the courtroom, of Division 2, of the above-entitled court, in the new Courthouse and Postoffice Building, Seventh and Mission Streets, San Francisco, California, move the said court for an order directing the defendants to file herein further and better particulars of the entry of the Central Pacific Railroad Company of California, a corporation, upon the real property and lands described in the complaint filed herein, alleged in their amended answer on page 6, paragraph I thereof, to have been made by said Central Pacific Railroad Company of California in the year 1863, under what claim of right said entry was made;

under what instrument or instruments, if any, said entry was made, and under what instrument or instruments, if any, possession of said lands has been held; to file herein a further and better statement of **[91]** the nature of their claim to the title of the property described in the complaint filed herein made in answer to said complaint; what created the alleged rights of defendants; by what instrument or instruments, if any, said Central Pacific Railway Company has acquired title to said real property alleged in said amended answer, on page 3, lines 9 to 13 inclusive, to have been acquired by said Central Pacific Railway Company, and upon what instrument or instruments, if any, said claims are based.

Said motion will be based upon said answer and all papers on file herein, and upon this notice, and will be made upon the ground that said parts of said answer are uncertain, indefinite and evasive.

Dated January 26th, 1915.

BURRELL G. WHITE,
Attorney for Complainant.

Due service and receipt of copy of the within Notice is hereby admitted this 26th day of January, 1915.

E. J. FOULDS,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed January 26, 1915.] **[92]**

At a stated term, to wit, the November term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 15th day of February, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

[Order Denying Motion for Further and Better Particulars, etc., and Granting Motion to Amend Twelfth Defense in First Amended Answer.]

Plaintiff's motion for further and better particulars as to the twelfth defense set up in defendants' amended answer, heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion thereon; it was ordered that said motion be and the same is hereby denied. Defendants' motion for leave to amend the twelfth defense in the first amended answer, heretofore heard and submitted, being now fully considered, and the Court having rendered its oral opinion thereon; it was ordered that said motion to amend be and the same is hereby granted. **[96]**

Notice of Motion to Transfer Action to Law Side of Court.

To the Above-named Complainant, and His Attorney:

YOU, AND EACH OF YOU, WILL PLEASE

TAKE NOTICE, that on Monday, the 21st day of June, 1915, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the court-room of the above-entitled court, in the United States Postoffice Building at Seventh and Mission Streets, in the city and county of San Francisco, State of California, the said defendants, jointly and severally, will move the said court for an order transferring the above-entitled action to the law side of the court.

Said motion will be made upon the following grounds:

I.

That it appears that the said complainant has a full, adequate and complete remedy at law.

II.

That it appears from the said complaint that the defendant Southern Pacific Company is in possession, and that it has no title thereto, and the plaintiff is the owner in fee thereof, and that an action in ejectment upon the law side of the Court is the proper [108] remedy, and if, on the other hand, ejectment will not lie, then an action for damages for the value of the land at the time of the taking of the possession thereof by Southern Pacific Company is the proper remedy, and such remedy is enforceable at law and not in equity.

III.

Because the amended complaint does not show jurisdiction in equity.

IV.

Because the amended complaint does not obviate

the objections heretofore urged to the jurisdiction and, therefore, the order of Court heretofore made, transferring the suit to the law side of the court, should remain in operative force.

Upon the hearing of said motion, said defendants will rely upon the amended complaint and upon the records of said cause and the papers on file.

Dated June 12th, 1915.

E. J. FOULDS,
ROBT. T. DEVLIN, and
WM. H. DEVLIN,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed June 15, 1915.] **[109]**

Notice of Motion for a Better Statement and for Further and Better Particulars.

To the Above-named Complainant, and His Attorney:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that on Monday, the 21st day of June, 1915, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, in the United States Postoffice Building at Seventh and Mission Streets, in the city and county of San Francisco, State of California, the said defendants, jointly and severally, will move the said Court for an order requiring the said plaintiff to furnish to defendants, jointly and severally, a further and better statement of the nature of the claim, and also further and better

particulars, upon the following matters stated in the amended complaint:

I.

Whether or not it is claimed that the defendant Southern Pacific Company is rightfully in possession of the property.

II.

Whether the remedy against the defendant Southern Pacific Company is for damages. **[110]**

III.

Whether the plaintiff was the owner in fee of the property described at the time the defendant Southern Pacific Company took possession.

IV.

What connection, if any, there is between the Central Pacific Railway Company out of possession and the Southern Pacific Company in possession.

V.

How the two causes of action set forth in the amended bill can be joined in one complaint, to wit, a cause of action to quiet title against the defendant Central Pacific Railway Company out of possession and against the defendant Southern Pacific Company in possession.

VI.

Why the plaintiff has not a full, complete and adequate remedy at law, namely; an action in ejectment on the law side against the defendant Southern Pacific Company.

Upon the hearing of said motion, said defendants will rely upon the amended complaint and upon the records of said cause and the papers on file.

Dated June 12, 1915.

E. J. FOULDS,
ROBT. T. DEVLIN and
WM. H. DEVLIN,
DEVLIN & DEVLIN,
Attorneys for Defendants.

[Filed June 15, 1915.] [111]

(Stipulation and Order as to Motions to Transfer Causes.)

It is hereby stipulated and agreed that defendants' motions to transfer said causes to the law side of the court, for further and better particulars, and to dismiss said causes which motions were noticed for and heard by the Court on June 21st, 1915, shall be taken and deemed to be made with reference to, and to apply to, the complaint as amended June 21st, 1915, by the amendments filed on said date; and that an order may be made in conformity herewith.

Dated July 1st, 1915.

BURRELL G. WHITE,
Attorney for Complainants.
DEVLIN & DEVLIN and
E. J. FOULDS,
Attorneys for Defendants.

So ordered this 6th day of July, 1915.

WM. C. VAN FLEET,
Judge.

Entered July 6, 1915, W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [112]

Notice of Motion for Further and Better Particulars as to Paragraph IX Added to Bill of Complaint by Separate Amendment.

To the Above-named Complainant, and His Attorney:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that on Monday, the 12th day of July, 1915, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, in the United States Postoffice building at Seventh and Mission Streets, in the city and county of San Francisco, State of California, the said defendants, jointly and severally, will move the said Court for an order for a better statement and further and better particulars as to the matters set forth in paragraph IX of the amended bill, filed on June 21st, 1915, upon the following grounds:

I.

That is cannot be told whether or not Central Pacific Railway Company maintains any railroad track, or other railroad property, over the land described in the complaint.

II.

That it cannot be told whether Southern Pacific Company and Central Pacific Railway Company are both using the railroad main track. [113]

III.

That it cannot be told how the prevention of the maintenance and operation of said railroad track would interfere with the service of Southern Pacific

Company to the general public, or how such allegation in any way adds to the cause of action of complainant.

IV.

That it cannot be told the width of the right of way for the main line track.

V.

That it cannot be told on what other portions of the property the switching tracks, or the freight sheds, or the wharves, are situated.

VI.

That it cannot be told in what way the public interest does not require the maintenance or continuance of the switching tracks, or the sheds, or the wharves.

VII.

That it cannot be told in what way the allegation in reference to the public interest not requiring the same in any way adds to the cause of action of complainant.

VIII.

That it cannot be told whether or not the complainant claims that all of the property described in the complaint is devoted to public use, or whether some part of the same is devoted to public use, and other parts are not, and, if so, what parts are, and what parts are not, or whether there is necessity therefor, or how this Court can determine the question of necessity, or why the said complainant, if the defendants do not own the property, and they, or either of them, are in possession, has not [114] the right to bring an action in ejectment on the law side of the court.

IX.

That it does not appear how the business streets of the city of Sacramento, named in paragraph IX, in any way affect the situation, or how the complainant has any interest in said streets, or why the foot of said streets and the lands adjacent thereto, is the most convenient point for the shipment of freight into and from the city of Sacramento, and, if so, why the defendant's companies, or either of them, cannot use the same, as well as anybody else, as a convenient point for the shipment of freight into and from the city of Sacramento, or why the commerce of the city of Sacramento in any way affects the action, or how or why the public interest of the citizens of the city of Sacramento, or of the county of Sacramento, or thereabouts, require the said property should not be used exclusively by the said defendant Southern Pacific Company, or how the said complainant can raise this question, or how the use of said property by Southern Pacific Company is subordinate to the requirement of public interest, or that the lands upon which said sheds are built should be open to use by others, and should be subject to the title of the alleged rights of the complainant therein and thereto, or what the said rights are.

X.

That the said complainant should be required to set forth better and further particulars, showing why, if it is not in possession of the property and the defendant Southern Pacific Company is, an action on the law side for ejectment would lie, and if, by reason of the property being devoted to public use, it

is not entitled to ejectment, why an action for damages on the law [115] side, for the taking of said property, is not open to it. It further should be required to set forth when the defendant Southern Pacific Company took possession of the property, and who was the owner of the property at the said time.

Upon the hearing of said motion, said defendants will rely upon the amended complaint and upon the records of said cause and the papers on file.

DATED July 1st, 1915.

E. J. FOULDS,
ROBT. T. DEVLIN and
WM. H. DEVLIN,
DEVLIN & DEVLIN,
Attorneys for Defendants.

Receipt of a copy admitted this 7th day of July, 1915.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed July 7, 1915.] [116]

Affidavit of Wm. H. Devlin.

State of California,
County of Sacramento,—ss.

Wm. H. Devlin, being first duly sworn, deposes and says:

That he is now, and at all the times herein mentioned was, a member of the law firm of Devlin & Devlin, who are now, and during all the times herein mentioned were, duly licensed attorneys at law with

their offices at Sacramento, California, and that he is now, and during all the times herein mentioned was, one of the attorneys for the defendants in the above-entitled proceeding, and, as such, he has charge of the defendants' case, so far as said firm is concerned.

That the above case was commenced on the 27th day of June 1914, and, at the same time, or shortly thereafter, fifteen companion cases were filed, all of which are now pending.

That on July 31st, 1914, deponent sent to Mr. Burrell G. White, [117] attorney for the complainant, a telegram, which was in the words and figures following, to wit:

"Sacramento, Cal., July 31, 1914.

Mr. Burrell G. White,
Attorney at Law,
Nevada Bank Bldg.,
San Francisco, Cal.

Am leaving on my vacation next Tuesday to be gone three weeks. Have decided to answer in all cases in Federal Court. As this will take time I wish you would extend time to answer in all cases to and including the fifteenth of September. Will consent to cases going on next trial calendar if desired by you, or to be tried at next April term at Sacramento. Please grant the continuance, otherwise I shall have no vacation.

WM. H. DEVLIN.

Charge to Acct. of Devlin & Devlin."

—and in reply thereto he received a telegram from Mr. Burrell G. White, a copy of which is as follows:

"San Francisco, Cal., July 31, 1914.

William H. Devlin,

Attorney at Law,

Sacramento.

Your telegram of July 31st received. Your request is granted. If we are to wait so long however I think you should send me a rough synopsis of your defense so that the time of preparation may not be lost to me; also that depositions may possibly not have to be taken.

BURREL G. WHITE."

That the above case and the companion cases referred to were on the trial calendar of the March, 1915, term of the above-entitled court, and were set for trial for the April term at Sacramento, California, the date set therefor being May 25th, 1915. That at the said Sacramento term the defendants moved to have the causes transferred to the law side of the Court, for the reason that the complaint in each case did not show that the action was properly upon the equity side of the Court, and on May 26th, 1915, the Court heard the argument upon this motion and made an order [118] granting the transfer to the law side, but allowed the complainant to file an amended complaint in each case within ten days to show, if he could, that each action was properly on the equity side. Pursuant to the leave so granted, the said complainant, on or about the 4th day of June, 1915, filed an amended complaint, and which was verified the same as the original complaint. That thereafter, within the time allowed by law, the said defendants moved to dismiss the action, based upon

the amended complaint, and also moved to transfer the case to the law side, claiming that the amended complaint stated no facts sufficient to constitute a cause of action, and that it should be dismissed, or if any cause of action were stated it was a legal cause of action and, hence, the action should be upon the law side. Both of these motions were subsequently argued and submitted and are still under submission. That the case is not at issue, as no answer to the amended complaint has ever been filed.

When the July term calendar of 1915 was made up by the clerk, the said causes were not placed upon the trial calendar by the clerk, for the reason that they were not at issue, by reason of the filing of the amended complaint and no answer being filed, and the time to answer has not commenced to run, because the motion to dismiss has not yet been passed upon, and the time to answer under Rule 29 of the New Equity Rules is five days after the order denying motion to dismiss is made, if made. In addition thereto, there was a motion for better and further particulars, which was then pending, and is still pending and under submission.

When the July, 1915, term calendar was called, Mr. Burrell G. White, attorney for the complainant in each case, asked the Court to set the cases for trial, but the Court then refused to do so, holding that the cases were not at issue, by reason of the matters pending [**119**] and as aforesaid set forth. That there has been no change in the situation since July, 1915.

Affiant is informed and believes and, therefor,

avers that the said cases were improperly upon the November, 1915, term calendar, as the said cases were not at issue, or ready for trial, but, at the request of the said Mr. Burrell G. White, the Court put them upon the November term calendar.

That at the hearing of the April term calendar at Sacramento, California, which was held on May 26th, 1915, it became necessary for the trial of the case to go over, because the Court had transferred it to the law side, conditionally, as aforesaid set forth, and had given the said complainant ten days in which to file an amended complaint.

That affiant has never entered into any stipulation, or agreed in any way, that the above case, or any of the companion cases, should be tried at San Francisco. The telegram sent by affiant to Mr. Burrel G. White, dated July 31st, 1914, above referred to, had reference to the condition of affairs then pending. At that time no motion to dismiss, or any other motion, was pending. When the cases were called on the March, 1915, calendar to be set for trial, both sides agreed that they should be tried at the April, 1915, term at Sacramento. The defendants in each of the cases if the motion to dismiss is denied, will be required to, and will, file an answer to the amended complaint, but the time to do so will not be operative until the motion to dismiss is passed upon.

Affiant has not, nor has his firm, nor has any of the other attorneys for the defendants, ever made any agreement or stipulation whatsoever that the above case, or any of the companion cases, should be tried at San Francisco.

Affiant further avers that it would be more convenient to the [120] Court, to counsel on both sides and to the witnesses, if the case be at issue, to have the case tried at the next April term at Sacramento, California, for these reasons:

(a) That for the defendants' case it will be necessary to call some of the local officials of the Southern Pacific Company, who are busily engaged in the operation of trains, and whose absence from the city will seriously interfere with the discharge of their duties to the public.

(b) That it will be necessary to offer in evidence many official records from the board of supervisors of the county of Sacramento, also from the city of Sacramento, and also various deeds and other recorded instruments from the office of the county recorder of the county of Sacramento.

(c) That as many witnesses residing in the county of Sacramento, State of California, will be or may be called, it would be more convenient for them to have the cases tried at Sacramento, as the entire subject matter and all of the evidence to be adduced by either side is expected, or is, to be obtained in Sacramento.

(d) That it will probably be necessary to offer in evidence many maps from the recorder's office of Sacramento County, and certified copies of the same cannot be had or obtained except at great expense.

That the defendants are not seeking to delay the trial of the above case, but claim that it is not at issue, by reason of the matters above set forth, namely: the pending motion to dismiss and the pend-

ing motion to transfer to the law side and the pending motion for a statement of better and further particulars, and that it could be tried to more convenience to all parties concerned if tried at the hearing of the next April calendar at Sacramento. [121]

Affiant absolutely denies that there ever was any stipulation, agreement or understanding of any kind that the above case, or any of the cases referred to, should be tried in San Francisco, or in fact, in any other place.

WM. H. DEVLIN.

Subscribed and sworn to before me, this 13th day of November, 1915.

[Seal] C. S. WOODWORTH,
Notary Public in and for the County of Sacramento, State of California.

[Filed November 15, 1915.] [122]

Affidavit of Burrell G. White.

State of California,
County of San Francisco,—ss.

Burrell G. White, being first duly sworn, deposes and says:

That he is now and at all the times herein mentioned was, a duly licensed attorney at law, with offices in the Nevada Bank Building, at No. 14 Montgomery St., San Francisco, California, and that he is now, and during all the times herein mentioned was, an attorney for the complainant in the above-entitled suit;

That affiant received the telegram dated July 31, 1914, copy of which is set out in affidavit of Mr. William H. Devlin filed herein.

That affiant caused to be sent to said William H. Devlin the telegram in reply, dated July 31, 1914, copy of which is set out in said affidavit of said William H. Devlin.

That on September 12th, 1914, Messrs. Devlin & Devlin, who are now, and have been at all the times herein mentioned, attorneys of record for defendants herein, caused to be delivered [123] to affiant, a letter in words and figures as follows:

"Subject:

P. C. Drescher vs. Central Pacific Ry. Co., et al., #126.

Heenan Inv. Co. vs. Central Pacific Ry. Co., et al., #127.

F. B. Adams vs. Central Pacific Ry. Co., et al., #128.

A. S. Hopkins Co. vs. Central Pacific Ry. Co., et al., #129.

John Breuner Co. vs. Central Pacific Ry. Co., et al., #130.

Burrell G. White, Esq.,
Attorney at Law,
Nevada Bank Bldg., 14 Montgomery St.,
San Francisco, Cal.

Dear Sir:

As we do not intend to file a motion to dismiss the actions above referred to, the papers in which were served on September 4th, 1914, we shall be obliged if you will sign the enclosed stipulations, extending

time of answer to and including October 20, 1914.

(Enc.) Very truly yours,

DEVLIN & DEVLIN."

That affiant in reliance upon the statement contained in said letter that defendant did not intend to file a motion to dismiss the actions referred to in said letter, signed the stipulations referred to in said letter and delivered the same to said Messrs. Devlin & Devlin.

That on September 29, 1914, said Messrs. Devlin & Devlin caused to be delivered to affiant a letter in words and figures as follows:

"Subject:

IN RE: W. A. CURTIS

vs.

CENTRAL PACIFIC RAILWAY CO.—No. 101

Burrell G. White, Attorney at Law,

Nevada Bank Bldg., 14 Montgomery St.,

San Francisco, Cal.

Dear Sir:

The motion to strike out parts of answer and motion for further and better particulars in the above-entitled action will be on the calendar in the United States District Court (2nd Division) on October 5th. Mr. William H. Devlin, who has charge of the matter, is at home ill and we should be obliged if you would consent to same being continued to October 26th.

Please advise, and oblige,

Very truly yours,

DEVLIN & DEVLIN." [124]

In reply to said letter affiant caused to be delivered to Messrs. Devlin & Devlin a letter in words and figures as follows:

"SUBJECT:

CURTIS

vs.

CENTRAL PACIFIC RAILROAD COMPANY.

DEVLIN and DEVLIN,

Attorneys at law,

Sacramento, Cal.

Dear Sirs:—

Your letter of September 29th, 1914, has been received. I regret to learn of the illness of Mr. Devlin. Of course, under the circumstances, hearing of the motion will not be urged on October 5th, if Mr. Devlin is ill and cannot be present. It will therefore be understood that the matter will be continued to the next calling of the Calendar. The continuance will be with the further understanding that the motion will be heard at the next calling of the Calendar, and that no further continuance will be asked.

In connection with this matter, and the possibility of delay, I am reminded of an understanding, which I have with Mr. William H. Devlin, that when it comes to a trial the same may be set down for hearing at as early a date as may be agreeable to the Court, and that no opposition to such a setting and time of trial by the defendants will be made.

If these matters be agreeable to you, please advise by return mail.

Very truly yours,

BURRELL G. WHITE."

That in reply to said last mentioned letter, Messrs. Devlin & Devlin caused to be delivered to affiant a letter in words and figures as follows: [125]

October 1, 1914.

"SUBJECT:
CURTIS vs.
CENTRAL RY. CO. et al.
Burrell G. White, Esq.,
Attorney at Law,
Nevada Bank Bldg.,
San Francisco, Cal.

Dear Sir:

Acknowledging receipt of yours of the 30th ult.: It is understood that the matter pending on October 5th, will be continued until the next calling of the calendar, at which time we shall be ready. So far as the trial of the case is concerned, there will be no effort, on our part to delay it. It is among the possibilities that Judge Van Fleet will prefer to try the case at Sacramento next April.

Very truly yours,
DEVLIN & DEVLIN."

That by reason of the statements contained in the foregoing letters and telegrams, complainants herein have relied upon the same as being the consent of the defendants to a trial of said suits at San Francisco "at as early a date as may be agreeable to the Court, and that no opposition to such a setting and time of trial by the defendants would be made."

That on May 28, 1915, at Sacramento, the above entitled suit and similar suits pending herein were continued until the July term at San Francisco, after

the Court had said *that there would be in San Francisco in July an outside judge or judges who would be ready to dispose of the cases.*

Attorneys for the defendants were present in Court and made no objection whatever to said continuance, and in reliance upon the statements contained in the letters and telegrams herein above copied, the attorney for complainants accepted the order of continuance as an order for trial at San Francisco.

That on the second Monday of July 1915, affiant appeared in the above-entitled Court and moved the setting of said suits for trial. Said motion was passed on the sole ground that various motions were pending which left the pleadings unsettled. No objection **[126]** whatever was made on any other ground to the setting of said suits for trial.

That prior to the hearing at Sacramento on May 28, 1915, at which time the order continuing the above-entitled suit until July was made, it had been agreed between Mr. William H. Devlin, affiant, and certain of the complainants in the suits pending herein, similar to the above-entitled suit, that the Court would be requested to continue the trial of all of said suits to a term of said court at San Francisco, not later than the November term, 1915.

That the ruling of the Court, upon the motion to transfer said suits to the law side of the court, relieved said attorneys of the necessity of moving for a continuance of the trials.

Affiant is informed and believes that said understanding and agreement was first discussed between

said Mr. William H. Devlin, and one Dwight H. Miller, an officer of Miller-Enright Company, and Miller Realty Company, a corporation, and complainant in one of the said suits, upon the initiative of said William H. Devlin; said Miller reported to said White the substance of the suggestions of said William H. Devlin for a continuance of the trial of said suits;

That affiant thereupon met said William H. Devlin in the offices of Devlin & Devlin, on May 28th, 1915, at 9:30 A. M., and discussed the matter of the proposed continuance which said William H. Devlin had discussed with said Miller, and said William Devlin then and there agreed that said suits then pending for trial at Sacramento might be continued for trial at San Francisco not later than the November term, 1915, subject to the convenience of the Court, and it was further agreed that motions pending for hearing at 10:00 o'clock of said date should be heard and disposed of;

That at noon, May 28th, 1915, said William H. Devlin met with [127] said Miller, and one Scott F. Ennis, and said White, and at said meeting the conversations and agreements above referred to were fully rehearsed in detail and agreed to by all parties present.

That the trial of said suits at San Francisco at a term not later than the November term, 1915, was conditioned solely upon the defendants mentioned carrying out certain proposals, made by said William H. Devlin in behalf of said defendants, before the calling of the July Calendar, 1915, in said Court,

which said proposals said defendants have not carried out.

BURRELL G. WHITE.

Subscribed and sworn to before me, this 18th day of November, 1915.

[Seal] ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

[Filed November 18, 1915.] [128]

Affidavit of Dwight H. Miller

State of California,

City and County of San Francisco,—ss.

Dwight H. Miller, being first duly sworn, deposes and says:

That he is now and at all the times herein mentioned was, a resident of the city of Sacramento, state of California. That he is an officer and one of the managing directors of Miller, Enright Co., and Millen Realty Co., complainant in equity suit No. 93 pending in the above-entitled court;

That on May 27, 1915, at Sacramento, California, he discussed with Mr. William H. Devlin, one of the attorneys for the defendants in the above-entitled suit, the question of trial of the above-entitled suits and other similar suits then pending for trial at Sacramento in the above-entitled court;

That said Devlin mentioned to affiant certain things which the said defendants were willing to do and urged said proposals as reasons why said suits should not be tried at Sacramento at that time;

That affiant reported to Burrell G. White, attorney for [129] complainants in said suits, the substance of said conversation with said Devlin, and said White said to affiant that he would agree to said proposals made by said Devlin to affiant, and that he would consent to a continuance of the trials then pending, if said Devlin would agree to a trial of said suits at San Francisco at a time not later than the November term, 1915, in the event the said proposals made by said Devlin were not carried out;

That at noon, May 22, 1915, affiant met said Devlin, said White, and one Scott F. Ennis, and then and there the proposals made by said Devlin were fully rehearsed, and at said meeting it was understood and agreed by and between all of the said parties last mentioned, that said suits would be tried at a time not later than at the November term, 1915, at San Francisco, if the proposals above referred to were not carried out in the meantime by the defendants.

That the said proposals above referred to have not been carried out by said defendants.

DWIGHT H. MILLER,

Subscribed and sworn to before me, this 17th day of November, 1915.

[Seal] ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

[Filed November 18, 1915.] [130]

Affidavit of Scott S. Ennis.

State of California,
City and County of San Francisco,—ss.

Scott F. Ennis, being first duly sworn, deposes and says:

That he is now, and at all the times herein mentioned was, a resident of the city of Sacramento, State of California, and an officer, and one of the managing directors of Ennis-Brown Company, a corporation and complainant in equity suit No. 88, pending in the above-entitled court.

That on May 28, 1915, affiant was informed by one Dwight H. Miller that Mr. William H. Devlin had made the proposal to said Miller that the above entitled, and other similar pending in the above entitled court should not be tried at Sacramento at that time.

That said Miller had reported to Burrell G. White, attorney for complainants in said suits, the proposals made by said Devlin, and that said White had approved of the same provided suits then pending should not be delayed as to trial beyond the November term calendar of said court at San Francisco, in the event the things to be done by the defendants as proposed by said Devlin were not carried out. [131]

That affiant agreed to abide by said understanding, and so advised said White.

That at noon, May 28, 1915, affiant met said Miller, said Devlin and said White, and then and there the proposals made by said Devlin were fully rehearsed

and it was then and there agreed that, if the defendants did not do the things proposed by said Devlin, the above entitled and other similar suits pending herein should be tried at a time not later than the November term calendar of said court at San Francisco.

That defendants have not carried out the proposals so made by said Devlin.

SCOTT F. ENNIS,

Subscribed and sworn to before me, this 17th day of November, 1915.

[Seal] J. K. DAGGETT,
Notary Public.

[Filed November 18, 1915.] **[132]**

Defendants' Objections to Complainant's Praecipe and Defendants' Praecipe for Transcript of Record on Appeal.

To the Above-named Complainant, and its Attorney, and to the Clerk of the Above-entitled Court:

Now come the above-named defendants and object to the inclusion in the transcript, asked for by the complainant by a notice, dated and filed December 23d, 1915, of any of the papers, records or proceedings therein, except the following, to wit:

I.

Amended bill of complaint.

II.

Amended to and of the amended bill.

III.

Motion of the defendants to dismiss the same.

IV.

Order, dated December 1st, 1915, granting defendants' motion to dismiss.

V.

Decree, entered December 20th, 1915, dismissing suit. **[133]**

VI.

Petition for order allowing appeal.

VII.

Assignment of errors.

VIII.

Order allowing appeal and fixing bond.

IX.

Bond on appeal.

X.

Complainant's praecipe for a transcript of record.

XI.

Citation on appeal.

Said objections are made upon the ground that only the papers and records above named are material, for the purpose of appeal from the judgment dismissing the action.

In the event, however, that the objections are not well taken, or are not regarded, then you, the above-named clerk, are hereby notified that the above-named defendants, being the appellees, desire additional portions of the record incorporated in the transcript, requested by the above-named complainant, as appellant, by notice to you, filed December 23d, 1915, and as hereinbefore more particularly set forth, such additional portions of the record, as so desired, being indicated as follows, to wit:

The above-named defendants, being such appellees, desire all the records, papers, documents, orders of the above-entitled court and proceedings in the above-entitled case to be set forth in the said transcript, and, in order that the said matters, which are omitted from the praecipe of the complainant may be specifically enumerated, the following additional portions of the [**134**] record to be incorporated into the transcript are desired by the said defendants, being the appellees herein:

I.

Notice of motion, dated September 21st, 1914, to strike out parts of answer, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

II.

Order of October 30th, 1914, denying motion to strike out parts of answer and granting motion for further and better particulars of answer, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

III.

Stipulation, dated November 4th, 1914, for time to amend answer, in case of Curtis vs. C. P. Ry. Co. et al., No. 101—In Equity.

IV.

Defendants' first amended answer, dated November 21st, 1914, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

V.

Opinion on order denying complainant's motion for further and better particulars entered December 23d, 1914.

VI.

Notice of motion, dated December 29th, 1914, to

review and vacate order.

VII.

Notice of motion, dated January 26th, 1915, for further and better particulars of answer, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

VIII.

Notice of motion, dated January 29th, 1915, for leave to amend twelfth defense in first amended answer, in case of Curtis vs. C. P. Ry. Co. et al., No. 101—In Equity.

IX.

Order of February 15, 1915, granting leave to amend twelfth defense in first amended answer and denying motion for further and better particulars of twelfth defense of answer, in case of Curtis vs. C. P. R. Co., et al., No. 101—In Equity. **[135]**

X.

Defendants' second amended answer, dated February 26th, 1915, in case of Curtis vs. C. P. Ry. Co., et al., #101—In Equity.

XI.

Notice of motion to transfer cause to law side, dated June 12th, 1915.

XII.

Notice of motion for further and better particulars, dated June 12th, 1915.

XIII.

Amendment to bill, filed June 21st, 1915.

Stipulation, dated July 1st, 1915, that motions to transfer, to dismiss and for further particulars be taken with reference to the complaint as amended June 21st, 1915.

XIV.

Notice of motion, dated July 1st, 1915, for further and better particulars of paragraph IX added to bill by amendment.

XV.

Order, entered July *1st*, 1915, that motion be taken to complaint as amended on June 21st, 1915.

XVI.

~~Affidavits of E. A. Carpenter, Scott F. Ennis, George K. Rider and F. B. Adams, each dated May 24th, 1915, and all relating to location and physical conditions of property described in complaint.~~

XVII.

Affidavit of Wm. H. Devlin, dated November 15th, 1915, relating to setting of cause for trial, in case of Curtis vs. C. P. Ry. Co. et al., # 101—In Equity.

XVIII.

Affidavits of Burrell G. White, Dwight H. Miller and Scott [136] F. Ennis, all served on November 19th, 1915, and all relating to setting of cause for trial, in case of Curtis vs. C. P. Ry. Co. et al., #101—In Equity.

XIX.

Defendants' praecipe for making up transcript. Dated December 31st, 1915.

E. J. FOULDS,
DEVLIN & DEVLIN,
Attorneys for Defendants.

Due and personal service hereof by copy admitted this 3d day of January, 1916.

BURRELL G. WHITE,
Attorney for Complainant.

[Filed January 3, 1916.] [137]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred thirty-seven (137) pages, numbered from 1 to 137, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $75.30; that said amount was paid by Burrell G. White, Esq., attorney for complainant; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 6th day of January, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Canceled Jan. 6, 1916. J. A. S.] [138]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from date hereof, to wit, on the 26th day of January, 1916, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, wherein Ennis-Brown Company, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 27th day of December, A. D. 1915.

WM. C. VAN FLEET,
Judge of United States District Court. **[139]**

[Endorsed]: No. 88. In the District Court of the United States, for the Northern District of the State of California. In Equity. Ennis-Brown Company,

a Corporation, Complainant, vs. Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Defendants. Citation on Appeal.

Service and receipt of a copy of the within Citation on Appeal is hereby admitted this 27th day of December, 1915. Devlin & Devlin, E. J. Foulds, Attorneys for Defendants.

Filed Dec. 27, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2729. United States Circuit Court of Appeals for the Ninth Circuit. Ennis-Brown Company, a Corporation, Appellant, vs. Central Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed January 6, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

Order Extending Time to File Record.

Good cause appearing therefor, it is hereby ordered that the appellant may have to and including the 8th day of January, 1916, within which to file his record

on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 6, 1916.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: No. 2729. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Jany. 8, 1916, to File Record Thereto and to Docket Case. Filed Jan. 6, 1916. F. D. Monckton, Clerk.

[Stipulated Directions as to Contents of Printed Record on Appeal.]

To the Honorable F. D. MONCKTON, Clerk of Said Court:

You are requested to omit from the printed record of said case the following portions of the record heretofore filed therein, viz.:

1. The title of the court and cause in each and every document and proceeding except in the Bill of Complaint and the Decree.

2. All verifications of pleadings and to insert in each case in lieu thereof "(Verified)."

3. All endorsements, except date of filing.

4. Affidavit, pages 70–72, inclusive.

5. Notice of Motion to Strike, pages 73–74, inclusive.

6. First Amended Answer, pages 77–87, inclusive, said first amended answer being identical with the original answer except that on page 6 of said original

answer, in the 6th line of the second paragraph the words "and that it" are omitted from the original answer and in the place and stead of said words there are in the amended answer the following words, "under, by and with the consent of the predecessors in interest of plaintiff, and that said railroad company."

7. Notice of Motion, pages 89–90, inclusive.

8. Notice of Motion, pages 93–95, inclusive.

~~9. Order, page 96.~~

10. Second Amended Answer, pages 97–107, inclusive, said second amended answer being identical with the original answer.

Dated February 4, 1916.

BURRELL G. WHITE,
Attorney and Solicitor for Appellant.
DEVLIN & DEVLIN,
E. J. FOULDS,
Attorneys and Solicitors for Appellees.

[Endorsed]: No. 2729. United States Circuit Court of Appeals, Ninth Circuit. Ennis-Brown Company, Appellant, vs. Central Pacific Railway Co. et al., Appellees. Stipulated Directions as to Contents of Printed Record on Appeal. Filed Feb. 7, 1916. F. D. Monckton, Clerk.

No. 2729

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ENNIS-BROWN COMPANY (a corporation),
Appellant and Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY (a corporation), and SOUTHERN PACIFIC COMPANY (a corporation),
Appellees and Defendants.

APPELLANTS' OPENING BRIEF.

BURRELL G. WHITE,
Attorney and Solicitor for Appellants and Complainants.

EDWARD ELLIOTT,
ROY S. BARTLETT,
Of Counsel.

Filed
MAR 17 1916
F. D. Monckton, Clerk.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ENNIS-BROWN COMPANY (a corporation),
Appellant and Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY (a corporation), and SOUTHERN PACIFIC COMPANY (a corporation),
Appellees and Defendants.

No. 2729*

APPELLANTS'* OPENING BRIEF.

Statement of Case.

The above entitled suit and the fifteen suits consolidated with it were instituted for the purpose of quieting appellants' title to certain land lying between the west line of Front Street and the Sacramento River, comprising the main portion of the river front of the City of Sacramento, California, for an injunction against the assertion of any adverse interest in said land by the appellees and for general relief.

The appellee Southern Pacific Company is in possession of all the land described in the several amended bills of complaint; the complainants (appellants) are also

* Because of the order of consolidation for purposes of appeal, made in the lower court (Tr. p. 43), reference to the appealing parties herein will be made in the plural and the effect of said order of consolidation will be discussed herein, beginning at page 144.

the owners and are in possession of the land facing Front Street on the east line thereof and opposite the parcels of river front described in the respective bills of complaint.

The suits were brought in June and September, 1914, under Sections 738, 379 and 380 of the Code of Civil Procedure of California, and, omitting the jurisdictional averments and description of property, the facts set up in each of the original bills of complaint (Tr. p. 1) are in substance these; that the complainant "is and at all the times mentioned herein was the owner in fee-simple" of the property described and "that the defendants and each of them claim an estate or interest in said property adverse to the complainant, which claim is without right", and

> "defendants have not nor has either of them any estate, title, right or interest in or to the property or any portion thereof; that the defendant Central Pacific Railway Company is not in possession of the premises involved or any part thereof".

The defendants answered the original bills and set up precisely similar defenses in each of the suits (Tr. p. 4), in substance the following: after denying title in complainants, they allege title and possession in the defendant Central Pacific Railway Company, it being further alleged that defendant Southern Pacific Company is in possession under a lease from the defendant Central Pacific Railway Company; the several statutes of limitation are pleaded and finally it is alleged that complainants are estopped to assert ownership and right of possession in the premises because the defendants

for many years have been in continuous possession, with full knowledge on the part of complainants and their predecessors in interest, using the land in the exercise of their business, as common carriers.

On March 1, 1915, the suits were set for trial at Sacramento for May 25, 1915.

On May 24, 1915, defendants moved to transfer the suits to the law side of the court upon the ground that it appeared that complainants had a plain, adequate and complete remedy in an action at law (Tr. p. 21); the court thereupon granted the motion to transfer to the law side, unless complainants should amend the bills of complaint within ten days (Tr. p. 22). The complainants filed amended bills in all respects similar to the original bills but containing the following additional averments (Tr. p. 14):

> "That defendants are and each of them is engaged in the general business of railroad corporations as common carriers of passengers and freight;" that the defendant Southern Pacific Company "is now and at all the times herein mentioned was in possession and using the land hereinabove described; that it maintains upon and over a portion of the property described in the amended bill herein a railroad main track over and upon which it operates trains in the exercise of its said business; to prevent the maintenance and operation of said railroad track would interfere with the service of said defendant Southern Pacific Company to the general public in the City of Sacramento, and in the County of Sacramento and elsewhere;
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> "On other portions of said property said Southern Pacific Company maintains other railroad tracks which are switching tracks and a large structure known as the Sacramento freight sheds and

sheds used as a wharf, bordering upon the Sacramento River. The public interest neither of the inhabitants of the City of Sacramento nor of the County of Sacramento, nor of any other community requires the maintenance or continuance of said last mentioned tracks or said sheds by said Southern Pacific Company. That all of said tracks herein mentioned and sheds are used exclusively by the defendant Southern Pacific Company and said company claims that as a public service corporation it is entitled to the continuous and exclusive use of said tracks, sheds, and the land upon which the same are situated.

"That the four most important business streets in the City of Sacramento running toward the Sacramento River are I, J, K, and L Streets; that said land is situated near the foot of said streets and borders upon the Sacramento River, and together with the land adjacent thereto, is the most convenient point for the shipment of freight into and from the City of Sacramento; that the commerce of the City of Sacramento by water is approximately one-half of the commerce of said city; that the public interest of the citizens of the City of Sacramento and of the County of Sacramento and thereabouts requires that said property should not be used exclusively by said defendant Southern Pacific Company; that the use of said property by said Southern Pacific Company is subordinate to the requirement of public interest that the land upon which said sheds are built should be open to use by others than defendant Southern Pacific Company and to the title and rights of complainant therein and thereto."

Defendants thereupon moved to dismiss in each suit upon the grounds set out in their notice of motion to dismiss (Tr. p. 22) contending,

(a) That the amended bills do not state facts sufficient to constitute a valid cause of action in equity;

(b) That the amended bills unite two causes of action; namely, a cause of action against the Central Pacific Railway Company, out of possession, and a cause of action against the Southern Pacific Company, in possession;

(c) That the suits cannot be maintained against the defendant Central Pacific Railway Company, (1) because the amended bills contain no allegation of privity or community of interest between that defendant and the defendant Southern Pacific Company, (2) because it appears upon the face of the bills that complainants are not in possession and that the land involved is not vacant and unoccupied;

(d) That the suits cannot be maintained against defendant Southern Pacific Company, (1) because the amended bills show that said company is in possession, (2) because the bills show that said company is a public service corporation.

(e) That the suits cannot be maintained at all in law or equity because the amended bills contain no allegation of ownership in plaintiff at the time defendant Southern Pacific Company took possession.

On December 1, 1915, the court filed an opinion (Tr. p. 25) sustaining the contention of defendants in the foregoing particulars, (a), (c) and (d) and each of the subdivisions thereof, and holding that, if the complainants have any cause of action at all, their remedy is in an action for damages for the taking of the land, and granted complainants ten days within which to amend their amended bills of complaint. On December 15, 1915,

complainants applied to the clerk of the lower court for an order for a decree pro confesso under Equity Rule 32; said application was granted and an order therefor accordingly entered (Tr. p. 40). On December 20th, upon motion of defendants, the court made an order vacating and setting aside said order for a decree pro confesso upon the ground that the same had been inadvertently and inadvisedly made. On the same day upon motion of complainants the court made an order consolidating the sixteen suits for the purposes of an appeal, to which order an exception of the defendants was taken and allowed (Tr. p. 43), and later a decree of dismissal was entered in each of the cases (Tr. p. 45). Complainants appealed to this court and assigned and now assign as error the following:

Assignments of Error.

I.

(Original Assignment VII.)

The said court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court.

II.

(Original Assignment VIII.)

The said court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court against the defendant Central Pacific Railway Company.

III.

(Original Assignment IX.)

The said court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court against defendant Southern Pacific Company.

IV.

(Original Assignment II.)

The said court erred, in granting defendants' motion to dismiss the amended bill of complaint herein on December 1, 1915, by holding and deciding that the defendant Central Pacific Railway Company was not properly joined as a defendant herein with the defendant Southern Pacific Company.

V.

(Original Assignment III.)

The said court erred, in granting said motion, by holding and deciding that complainant, while out of possession, could not maintain herein its suit to quiet its title against the defendant Central Pacific Railway Company, while out of possession and while the land involved was occupied.

VI.

(Original Assignment IV.)

The said court erred, in granting said motion, by holding and deciding that said amended bill of complaint did not state facts sufficient to entitle complainant to main-

tain its suit herein to quiet title against defendant Southern Pacific Company while in possession.

VII.

(Original Assignment V.)

The said court erred, in granting said motion, by holding and deciding that the amended bill of complaint showed that complainant had a plain, complete and adequate remedy in an action at law in damages.

VIII.

(Original Assignment XVIII.)

The said court erred by holding and deciding that the defendants had not on December 1, 1915, submitted to the jurisdiction of this court in equity in this suit, and by refusing to hold and decide that said defendants had waived their right, if any they or either of them ever had, to object to the jurisdiction of this court in equity in this suit.

IX.

(Original Assignment X.)

The said court erred in making said decree dismissing said suit in that it is not stated in said decree that the dismissal of said suit is without prejudice to an action at law.

X.

(Original Assignment XI.)

The said court erred in not ordering said suit transferred to the law side of said court if said amended bill did not and does not state a cause of action of cognizance in equity in this court.

XI.

(Original Assignment XXII.)

The said court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute any valid cause of action at all.

XII.

(Original Assignment XIX.)

The said court erred in granting defendants' motion to vacate, set aside and rescind the order for a decree pro confesso, in favor of complainant, entered herein on December 15, 1915, by holding and deciding that said order had been inadvertently and inadvisedly entered.

XIII.

(Original Assignment XX.)

The said court erred in vacating, setting aside and rescinding the order for a decree pro confesso, in favor of complainant, entered herein on December 15, 1915, by holding and deciding that the defendants were not and that neither of them was in default for failure to file a new or supplemental answer herein.

XIV.

(Original Assignment XXI.)

The said court erred in setting aside, vacating and rescinding said order for a decree pro confesso, on December 20, 1915, by refusing to hold and decide that the defendants were and each of them was in default for failure to answer the amended bill herein.

XV.

(Original Assignment XVI.)

The said court erred in denying complainant's motion for a statement of further and better particulars as to the matters set out in complainant's notice of motion for such statement, contained in the transcript of record of this suit on appeal.

The appellants say:

(a) That the amended bills of complaint contain facts sufficient to constitute a valid cause of action in equity in the federal courts under the California Statutes, Sections 738, 379 and 380, Code of Civil Procedure;

(b) That no allegation of privity or community of interest between co-defendants is necessary in a suit under the state statute;

(c) That the suits are maintainable in equity against the appellee Central Pacific Railway Company, out of possession, by appellants, also out of possession, and that as between appellants and said appellee it is immaterial whether or not the land is occupied or unoccupied inasmuch as, both parties being out of possession, there can be no remedy in an action at law by appellants against this appellee;

(d) That the only limitation ever placed by federal courts upon the enforcement of state statutes, enlarging equitable rights, has been that suits under such statutes should not be enforced in federal courts in cases where complainants have a plain, adequate and complete remedy in an action at law, and the parties consequently are entitled to a trial by jury;

(e) That the appellants have not a plain remedy in ejectment against the appellee Southern Pacific Company because it is alleged that said company is in possession as a public service corporation;

(f) That appellants have not an adequate and complete remedy in an action in damages against said Southern Pacific Company because damages for the taking of the land is not adequate or complete as a substitute for the rights of ownership in real property, and that under the allegations of the amended bills appellants should not be required to accept damages unless the land involved be necessary to the exclusive use of appellee Southern Pacific Company as a public service corporation, and that they are entitled to test the question of the necessity for the taking and are not compelled to admit the necessity and sue in damages;

(g) That the rights of all parties to the suits can be determined only in a suit in equity under the statutory provisions above referred to.

Authorities.

Sections 738, 379 and 380 of the Code of Civil Procedure of California provide:

> "Section 738. An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim," and other provisions irrelevant.
>
> "Section 379. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a

necessary party to a complete determination or settlement of the question involved therein," and other provisions irrelevant.

"Section 380. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed."

CAUSES UNDER SUCH STATUTES ARE SUITS IN EQUITY PER SE.

"Bills *quia timet,* such as the present, belong to the ancient jurisdiction in equity."

McConihay v. Wright, 121 U. S. 201; 30 L. ed. 932.*

"It has ever been held that a cause for removing cloud from title, or quieting title, or by way of bill of peace, is equitable, and appeals to a court of equitable cognizance."

Pacific Coal & Transportation Company v. Pioneer M. Co., 205 Fed. 579.

STATE STATUTES ENLARGING EQUITABLE RIGHTS ARE ENFORCEABLE IN FEDERAL COURTS.

That Federal Courts will enforce new equitable rights, conferred by state statutes, was first announced in Clark v. Smith, 13 Pet. 195; 10 L. ed. 123. The principle there announced has been applied or recognized

* Table of all cases cited begins at page 151 herein.

in many cases since. The state statute alone has been held to be sufficient ground for the exercise of equitable jurisdiction, but in some cases, under such statutes, jurisdiction has been declined on account of the existence, in favor of complainants, of a plain, adequate and complete remedy at law and for the reason that defendants have been entitled in such cases to a trial by jury. The tendency of decisions, however, has been toward exercising jurisdiction in suits brought under such statutes, as is clearly indicated by the following authorities:

Clark v. Smith, 13 Pet. 195; 10 L. ed. 123;
Cummings v. Bank, 101 U. S. 153; 25 L. ed. 903;
Chapman v. Brewer, 114 U. S. 158; 29 L. ed. 83;
Land & River Co. v. Bardon, 45 Fed. 706;
Same, 157 U. S. 327; 39 L. ed. 19;
Reynolds v. Crawfordsville Bank, 112 U. S. 405; 28 L. ed. 735;
Rich v. Braxton, 158 U. S. 375; 39 L. ed. 1022, 1032;
Grether v. Wright, 75 Fed. 742;
Darragh v. H. Wetter Mfg. Co., 78 Fed. 11;
Prentice v. Duluth, etc., 58 Fed. 441;
Southern Pacific Rd. Co. v. Stanley, 49 Fed. 265;
Book v. Justice, etc., 58 Fed. 830;
Harding v. Guice, 80 Fed. 164;
Pacific Coal & Transportation Co. v. Pioneer M. Co., 205 Fed. 577 (580).

It is unnecessary to quote from the leading case, Clark v. Smith, supra, for the reason that subsequent decisions, from which we shall quote, following the reas-

oning of that case, analyze and quote the pertinent portions of it.

In Reynolds v. Crawfordsville Bank, supra, it is said:

> "It may be conceded that the legislature of a state cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless, an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the states. Case of Broderick's Will, 21 Wall. 520 (88 U. S., XXII, 605). And although a state law cannot give jurisdiction to any federal court, yet it may give a substantial right, of such a character that, when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty or of common law. Ex parte McNiel, 13 Wall. 243 (80 U. S. XX, 626).
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> "Where, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title, which a court of equity would undertake to remove, we may yet look to the legislation of the state in which the court sits, to ascertain what constitutes a cloud upon the title; and what the state laws declare to be such the courts of the United States, sitting in equity, have jurisdiction to remove. This was expressly held in the case of Clark v. Smith, 13 Pet. 202, where it was said by this court:
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> > 'Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature.'
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> "The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is such a cloud upon the title

as will support a suit to remove it. Section 1070 of the Revised Statutes of Indiana, of the year 1881, provides as follows:

> 'An action may be brought by any person either in or out of possession, or by anyone having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of the title.'

"This Act confers upon anyone, against whom *another, whether in or out of possession,** claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action in the courts.

"Under this statute, it has been decided by the Supreme Court of Indiana that it is sufficient to aver that the defendant claims some interest or title, or pretended interest or title, adverse to complainant without stating what the title is. Marot v. Building Asso., 54 Ind. 37; R. R. Co. v. Oyler, 60 Ind. 383.

"The bill of complainant in this case complies with this rule by averring that 'Said Reynolds is, under his deed' from Baird, the assignee, 'claiming and asserting title paramount to the title of this complainant,' and the answer of the defendant admits that, under the deed executed to him by Baird, he is claiming whatever title to said lands the same confers on him.

"The question whether, under such a statute as that of Indiana and under the facts stated, the circuit court had jurisdiction to render the decree complained of, has been, in effect, decided in the affirmative by this court in the case of Holland v. Challen (ante, 52).

"In that case, a statute of Nebraska was under review, which provided that 'An action may be

*All italics in this brief are ours.

brought and prosecuted to final decree by any person, whether in actual possession or not, claiming title to real estate against any person who claims an adverse interest therein, for the purpose of determining such interest and quieting title'. The court, speaking by Mr. Justice Field, declared in substance that this statute dispensed with the general rule of courts of equity, that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession and, in most cases, that his title should be established at law or founded on undisputed evidence or long continued possession.

"If the equity courts of the United States in Nebraska could dispense with these well established rules of equity, and administer the rights conferred by this statute, it is not open to question that, in this case, the circuit court could disregard a similar rule and entertain jurisdiction of the appellee's case and accord to him the rights conferred by the statute law, even though the deed which the appellant claimed was void on its face.

"As the same authorizes the court to take cognizance of the case, *even when the title of defendant amounts to more than a mere cloud,* and applies in every case when the defendant claims an adverse interest in or title to the property in controversy, it is clear that the assignment of error under consideration has no support."

In Land and River Imp. Co. v. Bardon, 45 Fed. 706, it is said:

"This suit in equity is brought under a provision of the statute of Wisconsin (section 3186), the complainant being in possession of land, to bar the title of the former owner, and compel him to release. The provision is this:

'Any person having the possession and legal title to land may institute an action against any other person setting up a claim thereto, and, if

the plaintiff shall be able to substantiate his title to such land, the defendant shall be adjudged to release to the plaintiff all claim thereto, and to pay the costs of such action, unless the defendant shall, by answer, disclaim all title to such land, and give a release thereof to the plaintiff, in which case he shall recover costs, unless the court shall otherwise order. It shall be sufficient to aver in the complaint in such action the nature and extent of the plaintiff's estate in such land, describing it as accurately as may be, and that he is in possession thereof, and that the defendant makes some claim thereto, and to demand judgment that the plaintiff's claim be established against any claim of the defendant, and that he be forever barred against having or claiming any right or title to the land adverse to the plaintiff,' etc.

"There can be no doubt that this statute constitutes a considerable enlargement of the ordinary equitable action to quiet title to land and to remove a cloud; and it is seriously contended by the defendant that the remedy so provided cannot be available to suitors in these courts, being an innovation upon the settled rules of equity jurisdiction in such cases. But this contention can hardly be sustained. It is well settled that where the statute of a state enlarges a remedy in equity, or creates a new one, not inconsistent with the fundamental principles of equity jurisprudence, such remedy is open to suitors in the United States as well as in the state courts. This question was decided by the United States Supreme Court in Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495, under a similar statute in Nebraska. Indeed the Nebraska law was a much greater innovation than the statute in question, as it gave the action to the supposed owner whether in actual possession or not; thus, in a large degree, taking the place of an action of ejectment. Again in Reynolds v. Bank, 112 U. S. 405; 5 Sup. Ct. Rep. 213. In the last case a Michigan statute came in

question of the same tenor and substance as the one under which this suit is brought."

The foregoing suit was taken to the United States Supreme Court; the decree was affirmed and from the opinion we quote:

"We remarked in Gormley v. Clark, 134 U. S. 338, 348 [33; 909, 913] that while the rule was well settled that remedies in the courts of the United States at common law or in equity, according to the essential character of the case, are uncontrolled in that particular by the practice of the state courts, yet an enlargement of equitable rights by state statutes may be administered by the circuit courts of the United States, as well as by the courts of the state; and when the case is one of a remedial proceeding, *essentially of an equitable character,* there can be no objection to the exercise of the jurisdiction. Kieley v. McGlynn, 88 U. S. 21 Wall. 503, 520 (22: 599, 605); Holland v. Challen, 110 U. S. 15, 25 (28: 52, 56); Frost v. Spitley, 121 U. S. 552, 557 (30: 1010, 1012).

"Notwithstanding the statute may have enlarged the ordinary equitable action to quiet title and to remove a cloud, the circuit court had jurisdiction to award the relief prayed *if the bill were properly brought under the section in question.*"

Bardon v. Land & River Improvement Company, 157 U. S. 327; 39 L. ed. 720.

Darragh v. H. Wetter Mfg. Co., supra, contains a thorough review of authorities upon the point under consideration. The whole opinion is instructive, yet we shall quote only the following:

"In Clark v. Smith, 13 Pet. 195, 202, a suit in equity in the federal court, under a state statute, was maintained by a party in possession of real estate to cancel a junior patent, although this stat-

tute dispensed with the rule in equity that the title of the complainant must first be established at law. In Holland v. Challen, 110 U. S. 15, 25; 3 Sup. Ct. 495, a bill to quiet title to land in Nebraska, brought in the federal court by a complainant out of possession, was maintained under a statute of that state, although that statute dispensed with the equity rule that one must have established his title at law, and must be in possession, in order to maintain such a suit. In Cummings v. Bank, 101 U. S. 153, 157, the statute of a state had given to property holders the right to enjoin the payment of an illegal tax; and, in discussing the right of the complainant to maintain a suit in the national courts for that purpose, Mr. Justice Miller said:

> 'We have also held that, where a statute of a state created a new right or provided a new remedy, the federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires.'

"In Gormley v. Clark, 134 U. S. 338, 348, 10 Sup. Ct. 554, the supreme court sustained a suit in equity brought in the federal court under chapter 116, Rev. St. Ill., commonly called the 'Burnt Records Act', by one out of possession of real estate, to establish his title, *and to recover the possession of the property of the defendant,* and granted the relief he sought, *notwithstanding the earlier decision in Whitehead v. Shattuck.* In this case the Supreme Court again declared that:

> 'An enlargement of equitable rights by state statute may be administered by the circuit courts of the United States as well as by the courts of the state, and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction.'

"Finally, in Cowley v. Railroad Co., 159 U. S. 569, 582, 16 Sup. Ct. 127, a case is reported in which

a suit had been brought in one of the courts of Washington Territory to set aside a judgment of that court, for fraud, under a territorial statute which authorized the territorial court to vacate its judgments in original suits of this character brought for that purpose. The suit was transferred to the federal court, and there tried, but the circuit court dismissed the bill on the ground that it was not according to equity practice to vacate or act directly upon a judgment at law, that the complainant should have applied by petition or motion to set aside the judgment in the original cause, and that his remedy at law was plain and adequate. The supreme court reversed that decree. Mr. Justice Brown delivered the unanimous opinion of the court, in which he announces the same rules and cites the same authorities which he had so vigorously presented in his dissenting opinion in Cates v. Allen, 149 U. S. 451, 461, 13 Sup. Ct. 883, 977. In speaking of this suit, he said:

> '*Even if it were treated as in form a bill in equity, the right of the complainant would be gauged as well by the statute under which the bill was filed as by the general rules of equity jurisprudence.* * * * While the federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, *it remains,* in substance, *a proceeding under the statute,* with the original rights of the parties unchanged.'

"Upon a careful review of all these authorities and especially in view of the decisions in the last two cases to which we have adverted, it may, we think, be safely said that the following rules relative to the jurisdiction and power of the federal courts to enforce rights created, and to administer remedies provided, by state statutes for enforcement and administration in the courts of the states, have been firmly established in the jurisprudence of the United States; *Rights, created or provided by the statutes of the states to be pursued in the*

state courts may be enforced and administered in the federal courts, either at law, in equity, or in admiralty, as the nature of the new rights may require. Ex parte McNiel, 13 Wall. 236; Cummings v. Bank, 101 U. S. 153, 157; Trust Co. v. Krumseig (decided by this court at May term, 1896) 77 Fed. 32. *An enlargement of equitable rights* by the statutes of the states *may be administered by the national courts* as well as by the courts of the states. Case of Broderick's Will, 21 Wall. 503, 520; Clark v. Smith, 13 Pet. 195, 202; Holland v. Challen, 110 U. S. 15, 25, 3 Sup. Ct. 495; Frost v. Spitley, 121 U. S. 552, 557, 7 Sup. Ct. 1129; Reynolds v. Bank, 112 U. S. 405, 5 Sup. Ct. 213; Chapman v. Brewer, 114 U. S. 158, 170, 171, 5 Sup. Ct. 799; Gormley v. Clark, 134 U. S. 338, 348, 349, 10 Sup. Ct. 554; Bardon v. Improvement Co., 157 U. S. 327, 330, 15 Sup. Ct. 650; Cowley v. Railroad Co., 159 U. S. 569, 583, 16 Sup. Ct. 127.

> *'A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality.'* Ex parte McNeil, 13 Wall. 236; Davis v. Gray, 16 Wall. 203, 221; Cowley v. Railroad Co., 159 U. S. 569, 583, 16 Sup. Ct. 127."

In Rich v. Braxton, supra, it it held:

> "Upon the question of the jurisdiction of a court of equity to give the relief sought by the bill, but little need be said.
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> "In Simpson v. Edmiston, 23 W. Va. 675, 678, the court said that it had been repeatedly held that a court of equity has jurisdiction to set aside an illegal tax deed—citing Forqueran v. Donnally, 7 W. Va. 114; Jones v. Dils, 18 W. Va. 759; and Orr v. Wiley, 19 W. Va. 150. And in Danser v. Johnsons, 25 W. Va. 380, 387:
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> > 'It is fully settled in this state that a court of equity has jurisdiction to set aside a void tax deed.'

"*These authorities make it clear that if this case had remained in the state court no objection could have been made to the form of suit.* But as the jurisdiction of the courts of the United States, sitting in equity, cannot be controlled by the laws of the states or the decisions of the state courts—except that the courts of the United States, sitting in equity, may enforce new rights of an *equitable nature created by such laws,* Clark v. Smith, 38 U. S. 13 Pet. 195 (10: 123); Holland v. Challen, 110 U. S. 15 (28: 52). *It is proper to say that, according to settled principles, the plaintiffs were entitled to invoke the aid of a court of equity.*

"The principal ground upon which the contrary view is rested by the appellants is, that the bill assails the tax deeds under which they claim as fraudulent, void, and inoperative. And to support this view several adjudged cases are cited, some of which hold that where the title is merely legal, and where the validity of one title or the invalidity of another clearly appears on the face of documents that are accessible, and no particular circumstances are stated, showing the necessity for interference by equity, either for preventing suits or other vexation, the remedy is at law. Hipp v. Babin, 60 U. S. 19 How. 271 (15: 633); Whitehead v. Shattuck, 138 U. S. 146, 156 (34: 873, 876); Scott v. Neely, 140 U. S. 106, 110 (35: 358, 360); Smyth v. New Orleans Canal & Bkg. Co., 141 U. S. 656, 660 (35: 891, 892). The principle is thus stated by Mr. Justice Story:

> 'Where the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity to direct it to be canceled or delivered up, would not seem to apply; for, in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defense; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a

means of vexatious litigation, or serious injury.' 1 Eq. Jur., Sec. 700a.

"These authorities do not control the present question. It must be remembered that

'it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' Boyce v. Grundy, 28 U. S. 3 Pet. 210, 215 (7: 655, 657); Drexel v. Berney, 122 U. S. 241, 252 (30: 1219, 1222); Allen v. Hanks, 136 U. S. 300, 311 (34: 414, 418). *And the applicability of the rule depends upon the circumstances of each case.* Watson v. Sutherland, 72 U. S. 5 Wall. 74, 79 (18: 580, 582)."

The principle here considered has been before this court (9th Circuit) a number of times and in the fairly recent case of Pacific Coal and Tis. Co. v. Pioneer M. Co., supra, this court, through Judge Wolverton said, in considering the Alaska statute provided for quieting title, that, if the complainant bring himself "well within the statute, there can scarcely remain a doubt as to the jurisdiction in equity".

This court points out clearly in the case last cited, that such statutes as the California Statutes will be enforced in the federal courts, whenever a complainant has no plain, adequate and complete remedy in an action at law and that the only ground upon which jurisdiction in equity may be properly declined is a deprivation of a defendant of his right to a trial by jury.

The foregoing authorities show a tendency on the part of federal courts generally toward the exercise of jurisdiction in equity over suits brought under state

statutes which enlarge the class of complainants who may avail themselves of the equitable right touching the subject covered by the statute.

We come now to consider whether the complainants have brought themselves within the California Statutes.

THE AMENDED BILLS OF COMPLAINT CONTAIN A STATEMENT OF FACTS SUFFICIENT TO CONSTITUTE A VALID CAUSE OF ACTION UNDER THE CALIFORNIA STATUTES, SECTIONS 738, 379 AND 380, CODE OF CIVIL PROCEDURE.

In concise terms each of the bills alleges that complainant is the owner in fee, that the defendants and each of them assert a claim to the land involved which is adverse to complainant and without right.

> "Hereafter it shall be sufficient that a bill in equity shall contain * * * a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."
>
> Equity Rule 25.

Ely v. New Mexico and Arizona Railroad Company, 129 U. S. 291; 32 L. ed. 688, 690, was a proceeding to quiet title under a statute identical with the California Statute; with reference to the sufficiency of statement of facts in the bill it was said:

> "By the Act of the Territory of 1881, chap. 59, that statute is amended by striking out the requirement of the plaintiff's possession, so as to read as follows:
>
> 'An action may be brought by any person against another who claims an estate or interest

in said real property adverse to him, for the purpose of determining such adverse claim.'

"The manifest intent of the statute, as thus amended, is, that any person owning real property, whether in possession or not, in which any other person claims an adverse title or interest, may bring an action against him to determine the adverse claim and to quiet the plaintiff's title. *It extends to cases in which the plaintiff is out of possession and the defendant is in possession,* and in which, at common law, the plaintiff might have maintained ejectment. An allegation, in ordinary and concise terms, of the ultimate fact, that the plaintiff is the owner in fee, is sufficient, without setting out matters of evidence, or what have been sometimes called probative facts, which go to establish that ultimate fact; and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate or interest which he claims, the nature of which must be known to him, and may not be known to the plaintiff.

"These conclusions accord with the decisions of the Courts of California and Indiana under similar statutes, from one of which the present Statute of Arizona would seem to have been taken."

Section 738, C. C. P. of Cal., was before the United States Supreme Court in More v. Steinbach, 127 U. S. 70; 32 L. ed. 51, 56. From that case we extract the following:

"Second, as to the want of any allegation in the complaint of possession by the plaintiffs, or any evidence of that fact in the proofs, it is sufficient to say that, by section 738 of Code of Civil Procedure of California, a plaintiff asserting title to lands, though out of possession, may maintain an action to determine an adverse claim, estate, or in-

terest in the premises. People v. Center, 66 Cal. 551. A statute of Nebraska, authorizing a similar suit by a plaintiff out of possession, was before this court for consideration in Holland v. Challen, 110 U. S. 15 (28: 52), and the jurisdiction of a court of equity to grant the relief prayed in such case was sustained. See also Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 411 (28: 733, 736); Chapman v. Brewer, 114 U. S. 158, 170, 171 (20: 83, 87, 88); U. S. v. Wilson, 118 U. S. 86, 89 (30: 110, 112); Frost v. Spitley, 121 U. S. 552 (30: 1010, 1012)."

The allegations necessary or proper in a proceeding under Section 738 were again discussed in Devine v. Los Angeles, 202 U. S. 313, 333-334; 50 L. ed. 1046, 1053, where it is said:

"It seems, that it has often been held by the supreme court of California, that, in an action under this section, it is not necessary that the complaint should allege the nature of the estate or interest claimed by the defendant. Head v. Fordyce, 17 Cal. 151; Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Bulwer Consol. Min. Co. v. Standard Consol. Min. Co., 83 Cal. 589, 23 Pac. 1102.

"We are dealing with the question of the jurisdiction of the circuit court, and the general rule as to that is thus stated by Mr. Justice Peckham, speaking for the court, in Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co., supra [188 U. S. 632; 47 L. ed. 626].

'It would be wholly unnecessary and improper, in order to prove complainant's cause of action, to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer

to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading, so far as we are aware, and is improper.

'The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defense is.' "

The allegations required of a plaintiff, proceeding under Section 738, are set out in People v. Center, 66 Cal. 551, 562, from which we quote:

"In an action under section 738 of the Code of Civil Procedure, it is not necessary to allege in the complaint the nature of the estate or interest claimed by the defendant. (Crook v. Forsyth, supra.) * * * A proceeding by which one may compel another to expose and have adjudicated the nature of the interest on which he is asserting an adverse claim against the estate of the former, is one to be conducted in a court of equity. The discovery of the nature of the adverse claim precedes its adjudication. * * *

"Section 738 of the Code of Civil Procedure allows an action to be brought by any person against another who claims an estate or interest adverse to him. Its language is very broad. *If the plaintiff is out and the defendant is in possession, nevertheless the action can be maintained.* * * * In the case at bar, the defendants appealing averred in their answer that they were in possession of the lands when the action was commenced. The court did not find upon that averment, and the defendants did not complain of the omission. But the omission is immaterial, because the action is maintainable whether they were or were not in possession."

And it is further said in Castro v. Barry, 79 Cal. 443, that:

> "The complaint in this case alleged in substance that the plaintiff was the owner of certain real property; that the defendant claimed an interest therein adverse to the plaintiff; that such claim was without right, and that the defendant had no right, title, or interest whatever in the property. There were other allegations which will be noticed below. The prayer was, that defendant be required to set forth the nature of his claim, that it be adjudged to be void, and that defendant be enjoined from asserting it. * * *
>
> "The pleading is very simple. And it is well settled that the allegations above mentioned are sufficient. (Rough v. Simmons, 65 Cal. 227; Hesser v. Miller, 77 Cal. 192.)"

The amended bills of complaint contain all allegations necessary in a suit in the state courts and, doing so "there can scarcely remain a doubt of his (appellants') right to proceed in equity" in the federal courts.

> Pacific Coal and Trans. Co. v. Pioneer M. Co., 205 Fed. 580.

Nor is the effect of the statutory allegations of the bills destroyed or impaired by other allegations in the bills as to the character of the defendant corporations, but such additional allegations merely aid in showing the equity jurisdiction of the court, not going at all to the cause of action itself. Such appears from the authorities cited under the two heads next following.

As to the Central Pacific Railway Company it was held by the lower court that said defendant, out of possession, may not be joined with the defendant Southern

Pacific Company, in possession, as co-defendants in a suit to quiet title under the state statute without alleging a privity or community of interest between such co-defendants. Appellants say that in such suits there may be joined as co-defendants all parties who, without right, make any adverse claim to the property involved—without regard to the question of possession and without regard to whether a privity or community of interest is alleged or exists in fact between such co-defendants, and that the only limitation which federal courts have ever placed upon their sustaining such suits brought under said statutes has been that a defendant should not be deprived of his right to trial by jury if a plain, adequate and complete remedy in an action at law exists in favor of the complainant. In such suits it is common knowledge, gained from an inspection of records of proceedings under Section 738 and similar sections from other jurisdictions, that it is most common to make the Doe family parties defendant without any thought of privity of interest existing between co-defendants or the existence of any fact other than the assertion on the part of the defendants of an adverse claim without right.

WHERE A BILL OF COMPLAINT IN A SUIT IN EQUITY IN A FEDERAL COURT CONTAINS THE ALLEGATIONS WHICH ARE REQUIRED OF A PLAINTIFF SUING IN A STATE COURT, FEDERAL COURTS WILL TAKE JURISDICTION AND ADMINISTER SUCH RELIEF AS MIGHT BE GRANTED IN A STATE COURT.

In a suit under the Wyoming Statute, corresponding, but not entirely similar, to the California Statute, it was held in Gillis v. Downey, 85 Fed. 483, 488, that:

"Under this statute the supreme court of the state has held that a petition is sufficient which contains a general allegation that the petitioner is in the actual possession of the described premises, and that the defendant claims an estate or interest therein adverse to him. Durell v. Abbott, 44 Pac. 647. This action, therefore, could have been brought in the state court on a petition containing such allegations as the above case. And, where the requisite diverse citizenship exists, the action may be brought in the United States court, predicated of the local statute. Gaines v. Fuentes, 92 U. S. 10; Dennick v. Railroad Co., 103 U. S. 11; Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263; Chicot Co. v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695; Cowley v. Railroad Co., 159 U. S. 569, 16 Sup. Ct. 127. This is equally true in suits to quiet title. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495; Greeley v. Lowe, 155 U. S. 75, 15 Sup. Ct. 24; Harding v. Guice, 25 C. C. A. 352, 80 Fed. 162; Perego v. Dodge, 163 U. S. 165, 16 Sup. Ct. 971. As a suit to quiet title pertains to the inherent jurisdiction of courts of equity, it was competent for complainant to bring his action on the chancery side of the court. The statutory form of procedure is in aid and not exclusive of the right to proceed in equity."

The California Statutes and decisions cited hereinabove show that the position of the parties to these suits, relative to the occupancy of the land is utterly immaterial, and that in a suit in the state courts no privity of interest would be required to exist or to be alleged. Such being the state law, by statute and decision, the same will be followed by federal courts.

In Harding v. Guice, 80 Fed. 162, 164, it is said:

"The court of last resort of the State of West Virginia having construed its statutes so that a bill

> to remove a cloud upon a title can be brought by one out of possession, * * * this construction will control this court."

The oft quoted case of Holland v. Challen, 110 U. S. 15; 28 L. ed. 52, was a suit to quiet title, under the Nebraska Statute, in which the enlarged right of complainant, out of possession, was enforced. In that case it is said that state policy influences federal courts to administer the enlarged right in the same form as it may be pursued in the state court. The language of that case follows:

> "'The state legislatures', the court added, 'certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States, but *having created a right and at the same time prescribed the remedy to enforce it,* if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, *no reason exists why it should not be pursued in the same form as in the state court; on the contrary, propriety and convenience suggest that the practice should not materially differ where titles to lands are the subjects of investigation.* And such is the constant course of the federal courts.' The opinion concludes with the observation: 'That, when investigating and decreeing on titles in this country, we must deal with them in practice as we find them and accommodate our modes of proceeding, in a considerable degree, to the nature of the case and the character of the equities involved in the controversy, so as *to give effect to state legislation* and state policy'."

In California Oil and Gas Company v. Miller, 96 Fed 20, Judge Wellborn said:

> "Assuming that complainant in the present suit relies on sections 738 and 739 of the Code of Civil

> Procedure of California, the above-quoted decisions from the supreme court of said state, construing said sections are binding on this court (Fost. Fed. Prac. Sec. 375, and notes; Nobles v. Georgia, 168 U. S. 398, 18 Sup. Ct. 87), and I make the assumption indicated for the reason that equitable remedies given by the statutes of a state may be administered, under certain circumstances, in a federal court (Davidson v. Calkins, 92 Fed. 230; Clark v. Smith, 13 Pet. 195; Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 899; Bardon v. Improvement Co., 157 U. S. 327, 15 Sup. Ct. 650)."

There clearly appears to be no valid objection to joining the defendant Central Pacific Railway Company out of possession, with the defendant Southern Pacific Company, in possession, without showing any privity between them or otherwise charging them than with the making of an adverse claim without right. And of course it follows that if a defendant, *in possession,* may be joined with a defendant, *out of possession,* by a plaintiff, also out of possession (C. C. P., 380) it is not required, in order to sue a defendant, out of possession, that the land be unoccupied or vacant.

The question of possession has been a question for consideration in suits to quiet title in the federal courts only because of its easily indicating whether a complainant has a plain and adequate remedy at law.

In Wehrman v. Conklin, 155 U. S. 314; 39 L. ed. 167, 172, such statutes received a most thorough consideration and the authorities were fully reviewed. In the opinion the Court said:

> "These statutes have generally been held to be within the constitutional power of the legislature;

but the question still remains, *to what extent will they be enforced* in the federal courts, and how far are they *subservient to the constitutional provision entitling parties to a trial by jury,* and to the express provision of Revised Statutes, section 723, inhibiting suits in equity in any case where a plain, complete, and adequate remedy may be had at law. These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action, the laws of the several states to the contrary notwithstanding. Section 723 has never been regarded, however, as anything more than declaratory of the existing law (Boyce v. Grundy, 28 U. S. 3 Pet. 210 (7: 655), and as was held in New York Guaranty & I. Co. v. Memphis Water Co., 107 U. S. 205, 210 (27: 484, 486), 'was intended to emphasize the rule, and to impress it upon the attention of the courts.' It was not intended to restrict the ancient jurisdiction of courts of equity, or to prohibit their exercise of a concurrent jurisdiction with courts of law in cases where such concurrent jurisdiction had been previously upheld.

"The question of enforcing these state statutes was first considered in Clark v. Smith, 38 U. S. 13 Pet. 195 (10: 123), in which a bill was filed by a party in possession to compel the defendant to release a pretended title to certain lands claimed by him under patents from the state of Kentucky. The conveyance asked by the bill was sought to be in conformity with the provisions of an act of the assembly of Kentucky giving jurisdiction to courts of equity in such cases. It was held that the legislature

> 'having created a right, and having at the same time prescribed the remedy to enforce it, if the remedy prescribed is consistent with the ordinary modes of procedure on the chancery side of the federal courts, *no reason exists why it should not be pursued in the same form as in the state courts.* On the contrary, propriety and con-

venience suggest that the practice should not materially differ, where titles to land are the subjects of investigation.'

"This case was cited and approved in Parker v. Overman, 59 U. S. 18 How. 137 (15: 318), where a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff, was held to be enforceable in the federal courts. In Holland v. Challen, 110 U. S. 15 (28: 52), the principle of this case was extended to one of wild land, of which neither plaintiff nor defendant was in possession. Plaintiff claimed under a tax title, and the property was described in the bill as unoccupied, wild, uncultivated land. *The question was elaborately examined, and the jurisdiction sustained upon the ground that an enlargement of equitable rights by state statutes may be administered in the federal courts as well as in the courts of the state, citing Clark v. Smith, supra,* and *Re Broderick's Will,* 88 U. S. 21 Wall. 520 (22: 605). The case was treated as one where the plaintiff had no remedy at law against the defendant, who claimed an adverse interest in the premises. In delivering the opinion, however, it was intimated, page 25, that if a suit were brought in the Federal Court under the Nebraska Statute, against a party in possession,

'there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such case we are speaking.'

"Another step in the same direction was taken in Reynolds v. First Nat. Bank of Crawfordsville, 112 U. S. 405 (28: 733), in which a bill was sustained upon an equitable title, although it would appear from the report of the case that such title was not fortified by an actual possession: and in Chapman v. Brewer, 114 U. S. 158 (29: 83), a similar suit was upheld under a statute of Michigan permitting bills to quiet title to be filed by any person in possession.

"Subsequent cases, however, denied the power of the federal courts to afford relief under such statutes where the complainant was not in possession of the land, and in Whitehead v. Shattuck, 138 U. S. 146 (34: 873), particularly, it was held that, where the proceeding is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.

'The right which in this case the plaintiff wishes to assert, is his title to certain real property; and the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title *both parties have a constitutional right to call for a jury.*'

"The case of Holland v. Challen was distinguished as one where neither party was in possession of property, and it was further said that in the case of Reynolds v. First Nat. Bank of Crawfordsville, the question did not arise as to whether the plaintiff had a remedy at law, but whether a suit to remove the cloud mentioned would lie in a Federal Court. The case of United States v. Wilson, 118 U. S. 86 (30: 110), was really to the same effect, though not cited in Whitehead v. Shattuck. See also Frost v. Spitley, 121 U. S. 552 (30: 1010). But nothing was said in either of these cases to disturb the harmony of the previous cases.

"The real question, then, to be determined in this case is, whether the plaintiffs have an adequate remedy at law."

Additional authorities to the effect that the question of whether a complainant has a plain, adequate and complete remedy in an action at law is the determining consideration as to jurisdiction in equity should not be necessary. Yet we shall quote the following brief, terse

statement in Thompson v. Railroad Company in 6 Wall. 134; 18 L. ed. 765, 767:

> "Absence of a plain and adequate remedy at law is the only test of equity jurisdiction."

SUCH A REMEDY BEING THE TEST WE COME TO ASK WHETHER, IN A CASE WHERE AN OWNER IS OUT OF POSSESSION, AND A PARTY MAKING AN ADVERSE CLAIM IS ALSO OUT OF POSSESSION, IT IS, IN ANY WAY, MATERIAL BETWEEN THOSE PARTIES WHETHER THE LAND INVOLVED BE OCCUPIED BY A THIRD PARTY OR BE "VACANT AND UNOCCUPIED". IN EITHER EVENT WHAT REMEDY AT LAW HAS THE OWNER AGAINST SUCH CLAIMANT?

The lower court held that the amended bills affirmatively show lack of jurisdiction in equity in a federal court because of the allegation that the land involved is occupied land and not vacant land, it being the contention of the defendants, and the holding of the lower court, that in a case where neither complainant nor defendant is in possession the complainant may not sue under the statute, if a third party be in possession, and this appellants assign as error.

Under the statute a complainant may sue a defendant in possession.

> "If the plaintiff is out and the defendant is in possession, nevertheless, the action can be maintained."
>
> People v. Center, 66 Cal. 551, 562.

A fortiori he may sue a defendant out of possession; no statute even is required to enable the suing of a de-

fendant out of possession. Also a defendant in possession may be sued under the statute (Section 738) with a defendant in possession (Section 380).

Casey v. Leggett, 125 Cal. 664;
Reiner v. Schraeder, 146 Cal. 416;
Landregan v. Peppin, 94 Cal. 465.

Under the state statute a defendant out of possession may be joined with defendants in possession; under the statute, therefore, it conclusively appears that the right of a complainant out of possession to sue is not limited to land vacant and unoccupied and the enlarged right under the statute will be enforced in a federal court where the complainant brings himself by the allegations of his bill "well within the statute" and "there can scarcely remain a doubt of his right to proceed in equity." Pacific Coal and Transportation Co. v. Pioneer M. Co., 205 Fed. 580.

State statutes will be enforced by federal courts in the same form as in state courts where it can be done without violation of the principles they are accustomed to regard in the exercise of their jurisdiction.

Grillis v. Downey, 85 Fed. 488;
Am. Ass'n. v. Williams, 166 Fed. 17;
Grand Rapids & I. R. Co. v. Sparrow, 36 Fed. 210;
Greeley v. Lowe, 155 U. S. 58;
Brusie v. Gates, 80 Cal. 462;
Southern Pacific R. Company v. Stanley, 49 Fed. 263.

"The settled rule of the Supreme Court of the United States seems to be that, independently of

a statute of the state wherein the land lies, a bill to remove a cloud upon the title of a complainant will not lie, where he, the complainant, is not in actual possession of the premises, and that such a bill must show a legal title and actual possession. Only in such circumstances will a bill lie as a bill quia timet to protect and quiet such possession by the cancellation of an instrument which may disturb such possession or cloud the legal title. Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. ed. 1010; Dick v. Foraker, 155 U. S. 404, 414, 415, 15 Sup. Ct. 124, 39 L. ed. 201; United States v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. ed. 110. *But where by a local statute a bill in equity will lie to remove a cloud independently of possession, the enlarged equitable right thus created may be enforced by an equity court of the United States where there exists the requisite diversity of citizenship* or some other ground of federal jurisdiction. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. ed. 52; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167."

American Ass'n v. Williams, 166 Fed. 20.

In Grand Rapids & I. R. Co. v. Sparrow, 36 Fed. 210 in deciding a case under the Michigan Statute the Court said:

"Respecting the argument that the act of the legislature of Michigan (Laws 1887, No. 260, p. 337) extending the jurisdiction of the court of equity to quiet titles to cases where the lands are unoccupied, is unconstitutional, because it deprives the defendant of the right to a trial by jury, secured by the constitution of Michigan, (article 6, sec. 27), I think it must be held that this constitutional provision extends only to cases where by common law a trial by jury was customary. It does not reach those cases where the remedy is given by statute. At common law, ejectment did not lie where the defendant was not in possession,

and it is sustainable in such a case only by virtue of the statute in Michigan. The objection, therefore, cannot be sustained. Tabor v. Cook, 15 Mich. 322, and cases cited. It is further suggested that the federal court in equity will not take cognizance of such a case, because there is an ample remedy by ejectment at law. But this court will administer the remedies given by local statutes, where it can be done without violation of the principles it is accustomed to regard in the exercise of its jurisdiction. It is argued by the defendant that one of those principles is that the court will not take jurisdiction where there is a plain remedy at law; and it is said that ejectment is such a remedy. But, when the act defining the jurisdiction of the federal courts in equity was passed, and suits were forbidden when a plain, adequate and complete remedy at law existed, (Rev. St. U. S. Sec. 723), it was the remedy furnished by the common law which was thereby intended. Supplementary statutes, giving new legal remedies, do not disturb the original equitable jurisdiction, nor supplant it. *The courts in equity of the United States have undoubted cognizance of bills quia timet when the complainant is in possession. They may also take cognizance where he is not in possession, if local legislation gives the remedy in such a case, and the defendant is not thereby deprived of his right to a jury trial, according to the course of the common law.* According to the case of Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 496, the circumstance of the complainant's being in possession is not essential to the jurisdiction of courts of equity in such cases, and may be dispensed with. That being so, a bill in equity is maintainable, if there was not by common law a plain, adequate and complete remedy. *There was no such remedy where the defendant was out of possession.*"

CONSEQUENTLY, WE COME TO CONSIDER WHETHER POSSESSION BY THE DEFENDANT, SOUTHERN PACIFIC COMPANY, WILL DEFEAT THE JURISDICTION IN EQUITY.

As to that defendant the real question to be determined is (at least was up to the time of adoption of the New Equity Rules), as was stated in Wehrman v. Conklin, supra,

> "whether plaintiffs have an adequate remedy in an action at law".

The same test as to jurisdiction is often expressed in the opinions in language to the effect that the equitable rights given under state statutes will be enforced fully in the federal courts, if by doing so the parties be not deprived of their right to a trial by jury.

In Greeley v. Lowe, 155 U. S. 58; 39 L. ed. 69, 75, we find the following:

> "This court has held in a multitude of cases that where the laws of a particular state gave a remedy in equity, as, for instance, a bill by a party in or out of possession, to quiet title to lands, such remedy will be enforced in the Federal Courts, if it does not infringe upon the constitutional rights of the parties to a trial by jury."

Grether v. Wright, 75 Fed. 742, a case, the logic and clarity of which makes the reading of it in its entirety well worth while, shows the common foundation for the two rules last hereinabove referred to, by saying:

> "*We think this review of the cases justifies the conclusion that the main purpose of section 723 was to emphasize the necessity for preserving to litigants in courts of the United States the right to trial by jury secured by the seventh amendment in suits at common law,* and that, where a state stat-

> ute grants to litigants in its courts an equitable remedy which does not impinge on their right to a trial by jury at common law, courts of the United States, sitting in the state as courts of equity, may grant the same statutory relief as that afforded in the state tribunals. *In such cases, where the right of jury trial is not interfered with, the equitable remedy afforded by the statute of the state is usually so much more complete than the old remedies that the language of section 723 interposes no obstacle to equitable jurisdiction in the federal courts.*"

The fact that the defendant is in possession has no significance other than in being suggestive of a remedy in ejectment; if, however, the defendant is in possession under such circumstances that a complainant has no plain remedy in ejectment nor any other adequate remedy in an action at law, the possession is no obstruction to the maintenance of the suit in equity to quiet the title.

The case usually relied upon by parties objecting to jurisdiction in equity is Whitehead v. Shattuck, 138 U. S. 152; 34 L. ed. 874. Jurisdiction in that case was declined because the defendant was in possession and the bill showed no facts which indicated that the complainant had not a plain, adequate and complete remedy in an action at law. It is there said:

> "The facts set forth in the bill of the plaintiff clearly showed that he has a plain, adequate and complete remedy in an action at law."

In Continental Trust Co. v. Tallassee Falls Mfg. Co., 222 Fed. 694, 702, it is said that the

> "statute is merely declaratory of the well-recognized rule that a suit in equity cannot be sustained

> where there is a plain, adequate, and complete remedy at law. The converse is equally the settled law; that is, *if the plaintiff has a justiciable cause and he has no plain, adequate,* and *complete remedy at law, he must have one in equity.* * * * Of course, the courts have never undertaken to state all the instances where one out of possession can sustain a bill to quiet title. It would be impossible to do this, for the reason that each case must rest upon its own peculiar variety of facts and circumstances. *The question presented in each instance is whether there is a remedy at law, and, if so, whether it is plain, adequate, and complete, in view of all the circumstances and as the merits of the particular case require.* In other words, the test is that the remedy at law, in order to exclude equity jurisdiction, must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Tyler v. Savage, 143 U. S. 95, 12 Sup. Ct. 340, 36 L. ed. 82; Preston v. Sturgis, 183 Fed. 1, 105 C. C. A. 293, 32 L. R. A. (N. S.) 1020."

The Circuit Court of Appeals, in Stuart v. Union Pacific R. R. 178 Fed. 753, 756, says:

> "It is true, generally speaking, that in the courts of the United States a suit to quiet title cannot be maintained by a complainant who is not in possession against a defendant who is in possession, and this is so because there is a plain, complete and adequate remedy at law, * * * but *it is also true that in exceptional cases,* where there is no such remedy at law, *the general rule does not apply.*"

It appears, therefore, that suits to quiet title, as to jurisdiction of the federal courts over them, are subject to the same general principles which control in other suits. The test as to whether jurisdiction exists

on the equity side is not in reality whether a complainant is in possession, nor whether defendants are out of possession, but *whether the complainant has a plain, complete and adequate remedy in an action at law.*

> "If the controversy be one in which a Court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."
>
> Holland v. Challen, 110 U. S. 15; 28 L. ed. 52, 56.

An allegation, as to possession, in a suit in the federal courts is necessary only in so far as it is needed in order to show whether the complainant has a plain and adequate remedy in an action at law; as to being essential in order to state a valid cause of action in equity under the statute, it is no more essential in the federal courts than it is in a state court.

> "This action, therefore, could have been brought in the state court on a petition containing such allegations as the above case. And, where the requisite diverse citizenship exists, the action may be brought in the United States court, predicated on the local statute."
>
> Gillis v. Downey, 85 Fed. 483, 488.

> "Under the old practice act a party out of possession could not maintain an action to quiet title to real estate. (Practice Act, sec. 254; San Francisco v. Beideman, 17 Cal. 461; Rico v. Spence, 21 Cal. 504.) *But the present code gives the right to prosecute the action, generally, without reference to the question of possession.* (Code Civ. Proc., secs. 380, 738; People v. Center 66, Cal. 551.) Counsel for appellant concede this to be so, but claim that under sections 318 and 319 of the Code

> of Civil Procedure the plaintiff must at least show that he has been in possession of the land within a period of five years. But in our judgment the sections referred to do not apply to actions of this kind. (Richardson v. Williamson, 24 Cal. 299); and if they did, they are statutes of limitation, and do not affect the question of pleading raised here. It was not necessary for the respondent to show in his complaint that his cause of action was not barred by the statute of limitations. It not appearing on the face of the complaint that the action was barred, the question could only be presented by answer."
>
> Brusie v. Gates, 80 Cal. 465.

Appellees rely upon Whitehead v. Shattuck, 138 U. S. 146 (34 L. ed. 873), and Southern Pacific R. Co. v. Goodrich, 57 Fed. 879; in neither of these cases did the bill contain any allegation which tended to show that the complainant did not have a plain, complete and adequate remedy in ejectment, and it was upon that ground that the court held that it was without jurisdiction; that such is the fact is pointed out in New Jersey, etc. v. Gardner-Lacy Lumber Co., 178 Fed. 772, 779, where it is said:

> "While in *Whitehead v. Shattuck* the bill was dismissed because it appeared upon its face that the defendant was in possession and the plaintiff had a complete, adequate remedy at law."

In passing upon the question of jurisdiction in Whitehead v. Shattuck, the court recognized that in a suit to quiet title, no hard and fast rule could be laid down. Judge Field there said:

> "It would be difficult and perhaps impossible to state any general rule which would determine

in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other."

FEDERAL COURTS HAVE TAKEN JURISDICTION IN SUITS TO QUIET TITLE UNDER STATE STATUTES WHENEVER ANY ELEMENT HAS ENTERED INTO THE CONTROVERSY WHICH WOULD RENDER REMEDY THROUGH AN ACTION AT LAW INADEQUATE.

"If complainants show an independent right to equitable relief such as will authorize equitable jurisdiction, the prayer to quiet title will be entertained, *even though they are not in possession.* The rule that a bill to quiet title will *not* lie unless complainants are in possession has in recent years been modified by the terms of state legislation, and the effect given the same in the federal courts."

Woods v. Woods, 184 Fed. 159, 163.

It has been held that a bill in a suit to quiet title must show that the complainant has not a plain, complete and adequate remedy in an action at law. If the complainant relies upon the usual averments in a suit to quiet title, the bill containing no independent averments which bestow jurisdiction, then an allegation of possession by complainant or non-possession by defendants has been held necessary to confer jurisdiction, but such an allegation is necessary only because without such it will not appear that there is not a remedy in an action at law. If the bill contain other allegations which show that there is no plain, adequate and complete remedy in an action at law, then there is no necessity

for any allegations as to possession, for the court takes jurisdiction by reason of such other averments.

> "If the controversy be one in which a Court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."
>
> Holland v. Challen, 110 U. S. 15; 28 L. ed. 56.

Holland v. Challen was a suit to quiet title. No one was in possession. The fact that the court took jurisdiction where no one was in possession of the land and where, consequently, an action in ejectment could not afford adequate relief, shows plainly that the question of possession is secondary and subordinate to whether full relief can be had in an action at law.

> "It is not an objection to the jurisdiction of equity that legal questions are presented."
>
> Holland v. Challen, supra.

> "It frequently occurs that equitable and legal elements are so mingled that it is difficult to separate them, but this does not oust the jurisdiction. Decrees are so moulded as to meet the different phases of the controversies, and the rights of the litigants are preserved and appropriate remedies applied."
>
> New Jersey, etc. v. Gardner, etc., 178 Fed. 782.

> "It is strenuously insisted that the remedy at law was adequate, and that, as the right of possession was purely a legal question and *for a jury,* the Court of Chancery should have declined jurisdiction, but inasmuch as the case came within the provisions of the statute, and equity could alone afford the entire relief sought, the fact that legal questions were also involved could not oust the court of jurisdiction. The jurisdiction in equity

attaches, unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances."

Gormley v. Clark, 134 U. S. 338; 33 L. ed. 909, 914.

The appellants have not a plain remedy in an action in ejectment against the Southern Pacific Company. As was said in Northern Pacific Railroad Co. v. Smith, 171 U. S. 260, 271; 18 Sup. Ct. 794, 798; 43 L. ed. 157, 161:

"There is abundant authority for the proposition that, while no man can be deprived of his property, even though in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession of the land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. *His remedy must be sought either in a suit in equity,* or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes."

The same rule is laid down in Gurnsey v. Northern Cal. Power Co., 160 Cal. 712, where an electric transmission line had been built and it was sought to eject the company:

"Public policy requires that, under such circumstances, the remedy of ejectment should be denied to plaintiff, when the effect of a judgment in such an action would be to destroy the efficiency of the electric line system by taking possession from defendant of that part of it constructed over the land of plaintiff, and thus destroying the public rights which have intervened. * * *

> "The principle which underlies this rule is not based upon any consideration of rights pertaining to the public service corporation itself, but solely upon consideration of public policy."

Appellants admit that as to that portion of the land occupied by the appellee Southern Pacific Company which is essential to the service of the company as a railroad, the company may not be ousted; at the same time, appellants claim that it is only as to that portion which is thus esesntial that the company can invoke the doctrine announced in the two cases last cited. In other words, as was said in the Gurnsey case, the doctrine grows out of "no rights pertaining to the public service corporation itself, but solely upon considerations of public policy". That public policy protects such a company as to its railroad track, every-day observation convinces all. That public policy does not protect such a company, in the exclusive use of land which forms the harbor of a growing city upon a great, navigable stream, cannot be questioned. If the company's possession is to be defended upon the ground of public policy or the public interest, the very nature of the property involved and every-day observation negative the existence of the right to possession founded upon such a defense.

As was said in Ill. Cent. R. Co. v. Ill., 146 U. S. 387; 36 L. ed. 1043, the idea that a single "private corporation, created for a definite purpose, one limited to transportation of passengers and freight between distant points and the city, can be placed in control of the harbor of a city of vast and increasing commerce, cannot be defended."

We are not discussing here, at this time, ownership of the land, but we are assuming what appellants allege in that regard, viz.: ownership in themselves, and are now considering the question whether, given ownership in appellants, public interest demands, or could possibly demand, that the appellee, Southern Pacific Company, be protected in its exclusive use of the land involved, which is sufficiently described in the amended bills of complaint to show that the property of the sixteen complainants constitutes the virtual harbor of the City of Sacramento.

In the Illinois Central case, supra, the railroad relied upon a grant, from the state legislature, of a most substantial character, in perpetuity in fee, without the right of alienation, however, and the United States Supreme Court said of that grant:

> "We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation."

Appellants are not asking, and are not called upon to ask, the setting aside of any such grant as was involved in the preceding case. We are citing that case merely as it bears upon whether the appellee Southern Pacific Company can find any defense for its exclusive control of the harbor of the City of Sacramento in the demands of public policy. If the company in possession does not own the land, its only right is a right of possession in which the public interest or public policy protects it. If public policy offers no protection to the company, then,

as between the parties to these suits, the appellants are entitled to every right which ownership in fee draws to it, including the right of possession. On account of public policy, the United States Supreme Court not only held that the railroad company (in the Illinois Central case, supra) had no right to exclusive control over the land involved, but, in order to give effect to the clear demands of public policy as contrary to the claims of the company, the court found the grant, although it was of the character hereinabove indicated, was no deterring obstacle, but set it aside upon the ground that, so contrary to public policy was the exclusive control of the harbor of a city by a private transportation company, public interest exacted that the grant should be held to be only a revocable license.

In all the opinions touching the question of the right of a public service corporation in possession of land to keep possession, once in possession, it has been made plain that the consideration shown, which has led to the well-recognized doctrine against ejectment, is founded upon public interest alone and extends only to property which is necessary to continuous operation by such corporation, or, as many of the cases state it, to such land as is "absolutely essential" to the operation of the utility. As recently as in Western Union Telegraph Co. v. Ga. R. & Banking Co., 227 Fed. 291, the following language and citations are found:

> "This question has been decided in principle adversely to the contentions of the defendants in the case of Atlanta, Knoxville & Northern Ry. Co. v. Barker, 105 Ga. 534-542, 31 S. E. 452, in which in a very elaborate opinion Mr. Justice Cobb held that

a person could not recover in ejectment a right of way occupied by a railroad over his land upon which the railroad had built *its tracks* and *was operating* its lines, although the plaintiff held title to the land; *the decision being based upon the interest of the public involved* in the continuous operation of the railroad. The same question is discussed and decided in the same way in the case of Charleston, etc., Ry. Co. v. Hughes, 105 Ga. 1, 16, 30 S. E. 972, 978, 70 Am. St. Rep. 17, where a railroad company entered upon certain property by agreement with the life tenant, and thereafter upon the death of the life tenant the remaindermen brought suit for the land. In this case the court said:

> "'Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight, and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession, *which is absolutely essential to its complete performance of the public duties required of it,* become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject-matter of the controversy'.

"These decisions are quoted approvingly by the Supreme Court of the United States in several cases. The Court of Appeals of the Eighth Cir-

> cuit reached the same conclusion in the case of St. Paul, etc., Co. v. W. U. Tel. Co., 118 Fed. 497, 519, 55 C. C. A. 263, cited above, in which it granted the alternative relief prayed for in this case. The Supreme Court of the United States, in the case of New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, L. ed. 820, citing the two Georgia case above in 105 Ga., granted the same alternative relief to the city of New York in a very exhaustive opinion on the subject. See, also, Roberts v. Northern Pacific R. R. Co., 158 U. S. 1-30, 15 Sup. Ct. 756, 39 L. ed. 873; Northern Pacific R. R. Co. v. Smith, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. ed. 157; Donohue v. El Paso, etc., R. R. Co., 214 U. S. 499, 29 Sup. Ct. 698, 53 L. ed. 1060."

We know of no case of final decision in an appellate court where a court of equity has declined jurisdiction of a suit of the character of this appeal. As is stated in the foregoing quotation, the relief granted has usually been of an alternative character, giving the defendant time within which to pay for the land, if it be shown upon trial to be essential to the operation of the road, but in no case has the right to try the question of a corporation's right to possession been denied a complainant in equity under conditions at all similar to those presented in the pending suits. The fact that the appellees are public service corporations does not give them immunity from being sued in equity. The cases cited in the case last above quoted were suits in equity tried upon their merits, with decrees, and wherever decided for complainants, the decrees saved to the defendants only the right to pay for the land "absolutely essential" to continuous operation of the road. Under the pleadings, ownership in appellants must be assumed,

and, as was said in Sharon v. Tucker, 144 U. S. 545; 36 L. ed. 535:

> "As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate, or interest of parties, that is, their title, may be proved or secured, or to remove obstacles which hinder its enjoyment. 1 Pom. Eq. Jur. Sec. 171. The form of the remedy will vary according to the particular circumstances of each case. 'It is absolutely impossible' says Pomeroy, in his treatise 'to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interest, and of the circumstances attending them, and of the relations arising from them, are practically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations." * * *
>
> "'Equity', said the Court, 'will frequently interfere to remove difficulties in land titles, where a party cannot proceed without difficulty at law; * * * and in many such cases it will lighten the burden, and settle many controversies, and bring them into a small scope. And where the title is purely legal, for such and similar causes to those we have enumerated, equity has carved out a branch of jurisdiction, and a class of bills, termed in the books, ejectment bills, in which not only the title is made clear, but the possession decreed also."

Suits, involving the questions here presented, against public service corporations in possession, are most

numerous. The opinions in them set out that they are properly suits in equity, because in equity alone can decrees be made and entered so moulded as to suit the varying circumstances arising. In Highland Boy Gold Min. Co. v. Strickley, 116 Fed. 852, 855, it is said:

> "Counsel for the defendant invoke the rule that, where the owner of land has knowingly permitted a corporation that is entitled to exercise the right of eminent domain to construct and put in operation its railway, tramway, or other improvement upon his property, he is thereby estopped from recovering possession of the property occupied, and is restricted to his judgment for just compensation. Buckwalter v. Railway Co. (Kan.) 67 Pac. 831, 832, and cases there cited. Conceding, without deciding, the soundness of this rule, and its applicability to the case at bar, there are two insuperable objections to a reversal of this judgment on its account. In the first place, the estoppel upon which counsel relies is an equitable, and not a legal, one. It is not an estoppel of record, but an estoppel in pais. The defense which he founds upon it is not a defense at law, but a defense in equity. * * *
>
> "*That ruling may well have been sustained upon the ground that there had been no evidence offered or introduced to establish the proposition that it was necessary for the defendant to use the premises it was occupying, or any part of the property of the plaintiff, for the purpose of conducting its mining and smelting operations. It is always an indispensable prerequisite of the right to exercise the power of eminent domain over the property of an owner of real estate to show that it is necessary to use his property to carry on the business of the quasi public corporation which seeks it.* Mining Co. v. Seawell, 11 Nev. 394; Mining Co. v. Corcoran, 15 Nev. 147, 154. There was no proof, and no offer of proof, that it was necessary to use any portion of the property of the

plaintiff to conveniently conduct the business of the defendant. In the absence of this and other evidence which would warrant this company in exercising its right of eminent domain, if it has that right, there was no error in the refusal of the court to permit it to prove the value of this property, nor in its instruction to the jury to return a verdict for the plaintiff."

Again, in Osborne & Co. v. Missouri Pac. R. Co., 147 U. S. 248; 37 L. ed. 155, 161, it is said:

> "Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition.
>
> "Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiae.*"

A distinction has been made between suits where it appears that only a damage has resulted to the property involved, and those presenting a taking of the land involved, entitling the owner to demand compensation.

> "And if the case made discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere. To the same effect is Booth on Street Railway Law, 189; Elliott on Roads and Streets, 536; Tiedeman on Municipal Corporations, sec. 307; 2 Dillon on Municipal Corporations, sec. 723d; Story v. New York Elevated R. R. Co., 90 N. Y. 179; 43 Am. Rep. 146;

Lahr v. Metropolitan etc. R. R. etc Co., 104 N. Y. 268; Columbus Ry. Co. v. Witherow, 82 Ala. 190; State v. Berdetta, 73 Ind. 185; 38 Am. Rep. 117."

Willamette I. W. v. Oregon Ry. etc. Co., 46 Am. St. Rep. 620, 627.

Nevertheless, in even the former class of cases, jurisdiction in equity has not been uniformly declined, as appears from Story v. N. Y. Elevated Ry. Co., 90 N. Y. 122; 43 Am. Rep. 146, from which case we extract the following (pp. 151, 153, 158, 159-161):

"While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon which is subversive of and repugnant to the uses of the street as an open public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact depending upon the nature and character of the structure authorized.

* * * * * * * *

"The defendant's railroad, as authorized by the legislature, directly encroaches upon the plaintiff's easement and appropriates his property to the uses and purposes of the corporation. This constitutes a taking of property for public use. It follows that such a taking cannot be authorized except upon condition that the defendant makes compensation to the plaintiff for the property thus taken.

* * * * * * * *

"The argument has been pressed upon our attention with great ability that as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may in its discretion appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure or the extent of the injury wrought upon property abutting

thereon. This is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure. This court has repeatedly held that such a rule has no application where the abutting owner owns the fee of the bed of the street; and we are of opinion that in cases where the public has taken the fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. * * *

"The argument drawn from the great benefit which these roads have conferred upon the city of New York can have but little weight in determining the legal question presented in this case. No doubt these roads have added much to the aggregate wealth of the city of New York, and have greately promoted the convenience of its citizens; but the burden of so great a public improvement cannot rightfully be cast upon a few of its citizens, by appropriating their property to the public use, without compensation. The inhibition found in the Constitution against the right of the sovereign to appropriate private property to public use without making compensation therefor was intended to secure all citizens alike against being compelled to contribute unequally to the public burdens.

"We are of opinion that the law under which the defendant is incorporated authorizes it *to acquire such property as may be necessary* for its uses and purposes, upon making compensation therefor. This was substantially determined in the Matter of New York Elevated Railroad, 70 N. Y. 327; Gilbert Elevated Railroad Co., id., 361.

"We have reached in this case the following conclusions:

"First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right

or privilege in Front street, which entitles him to have the same kept open and continued as a public street for the benefit of his abutting property.

"Second. That this right or privilege constitutes an easement in the bed of the street which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the Constitution, of which he cannot be deprived without compensation.

"Third. That such a structure as the court found the defendant was about to erect in Front street and which it has since erected, is inconsistent with the use of Front street as a public street.

"Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

"Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character—and if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff—he has the right to restrain the erection and continuance of the road by injunction.

"Sixth. That the statutes under which the defendant is organized authorize it *to acquire such property as may be necessary* for its construction and operation by the exercise of the right of eminent domain.

"Seventh. The injunction prohibiting the continuance of the road in Front street should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same."

Disposing of controversies of this sort in suits in equity is not the carrying of an action at law in damages into a court of equity, as is contended by appellees. The point, however, that such is the case, has often been made, and is satisfactorily disposed of against such a

contention in Galway v. Metropolitan Elevated Railway Co., 28 N. E. 479, 482, where it is said:

> "The defendants' chief contention is that the relief in equity, as now given against elevated railroads for invasions of the rights of abutting owners in streets, is, practically, an action to recover permanent damages for such injuries. * * * While equity courts have frequently suspended the remedy, as they did in this case, by injunction upon conditions, as for a specified time, or until the wrong-doer has been afforded an opportunity to condemn the property invaded, or has satisfied the owner's damages, they have never, to our knowledge, rendered judgment for such damages, or authorized the collection thereof by the owner. The privilege of securing the right to continue the trespasses complained of has, when authorized, been granted as an act of grace and favor to the offending party and not as matter of right to the injured owner. * * * Equity courts can, by virtue of their power to grant specific relief, obviate the difficulty attending an action at law in giving permanent damages for an injury to real property, by providing that a title to the easements required shall be conveyed as a condition of the relief granted. The court, having the authority to grant a perpetual injunction, does not impair its exercise of such authority by permitting the offender to escape its effect by voluntarily paying the owner for the property injured. It is thus left optional with the trespasser to remedy the wrong done by him or to suffer the judgment of the court to stand. While the injury inflicted upon the wrong-doer by neglect to comply with the conditions may be so onerous, in many cases, as to inflict great loss upon him, it nevertheless does no more than to place in his hands the means of escaping from the disastrous consequences of a judgment which has been rendered inoperative by his own wrongful conduct. A party who voluntarily prosecutes a public enterprise for his own benefit, without regard to the

legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct; but this is the result of his own volition, and the injury which necessarily follows such action cannot lawfully be imposed upon the parties injured without disregarding the constitutional provisions intended for their protection. It furnishes no cause of complaint to the wrongdoer that the court, having power to restrain him altogether from continuing his trespasses, should mitigate the severity of its judgment by authorizing him to repeat them upon complying with special conditions prescribed by the judgment, so long as it is left to his election to perform them or not."

In New York v. Pine, 185 U. S. 93, 46 L. ed. 820, 825, it is said:

"But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues."

In the case cited by the lower court, as the basis of the court's decision, Roberts v. Northern Pac. R. Co., 158 U. S. 1; 39 L. ed. 873, 876, recognition is given to the jurisdiction of a court of equity to determine con-

flicting claims between owners and railroads in possession. The opinion in that case limits the rights of a railroad to hold possession to such of the property as it could have condemned by the exercise of eminent domain.

> "So far as those portions of the lands, described in the bill of complaint, consist of parcels held and used by the railway company for the *necessary* and *useful purposes of their road as a public highway,* it is obvious that the title and possession thereof cannot be successfully assailed by the appellants. * * *
>
> "The conclusion, therefore, seems warranted that, as to those portions of the lands in question which are occupied and used by the railroad company, the county having stood by for years, and permitted the company to proceed in the construction of its road and appurtenances at a vast expense, and having accepted large sums as taxes, would be estopped from interfering with the possession of the railroad company. A fortiori, it follows that Roberts, buying with notice, could not maintain either trespass or ejectment for such portions, nor would he, as such purchaser, be entitled to recover damages for the occupation thereof.
>
> "*The foregoing observations apply only to those portions of the lands in question which have been actually occupied and used by the railroad company for corporate purposes, or, in other words, to such lands as the railroad company could have condemned by the exercise of its right of eminent domain.*
>
> "But, as it appears in the bill and answer, that considerable portions of the land in dispute are not held or occupied *by the railroad company for its necessary public purposes,* but for sale to others, and presumably could not have been procured by the company under its power of condemnation, other questions are raised for our consideration."

If a railroad in possession may not be sued in order that the extent of its right to condemn may be tested, or, what is the same thing, that the necessity may be tested, then the observations made by the court in the Roberts case would necessarily be made to apply not, as the Court says, to such land as the railroad might condemn, but to all land in its possession—by the mere assertion that the land is necessary.

Under that portion of the foregoing quotation from the Roberts case which states that "*a fortiori,* it follows that Roberts, buying with notice, could not maintain either trespass or ejectment for such portions, nor would he, as such purchaser, be entitled to recover damages for the occupation thereof", the lower court held that complainants did not state facts sufficient to constitute any cause of action against the defendant Southern Pacific Company for the reason that "it is settled that the right of action for damages in such an instance is in the party holding the title at the time of the original wrongful entry".

Appellants concede that, where a railroad company enters under an instrument which places no limit upon the time during which the company may hold, or enters permissively by the acquiescence of owners without any agreement as to the length of time during which the company is to hold, the law is as stated in the last quotation from the opinion of the lower court. Appellants, however, say that, if a railroad company be in possession under a lease for a definite period of years, or be in possession under any sort of circumstances which fix the length of time during which the company

has the right to hold, upon the expiration of such time, an owner, at the time of expiration, is entitled to every right which the owner at the time of the original entry was entitled to, and that the holding over of the company after such expiration is wrongful, for which the owner at that time has his redress. In other words, the original owner may sell the property involved, subject to whatever agreements existed affecting the property, and upon the expiration of such agreements, the then owner may sue without reference to the original entry or subsequent holding of the company.

It is alleged in the answers (Trans. pp. 4, 8), "that in the year 1863, Central Pacific Railroad Company of California, a corporation formed, organized and existing under the laws of the State of California, and the predecessor in interest of the said defendants, entered into possession of the said real property and lands described in the complaint." Said Central Pacific Railroad Company of California was organized in the month of June, 1861; said company was consolidated with the Central Pacific Railroad Company, a corporation formed and organized under the laws of the State of California, in the month of August, 1870, and defendant Central Pacific Railway Company is the successor in interest of the said last-named corporation. If the Central Pacific Railroad Company of California entered under such circumstances as fixed its right to hold, let us say for the purpose of this point, at fifty years, it would follow that the rights of the company to hold, so far as any rights existed in the company itself, expired in 1913. It certainly would not be logical, it is not the law, that

the owner in 1913, being a purchaser through mesne conveyances from the owner in 1863, should show title in himself in the year 1863, but at most would be required to show ownership in himself at the time of expiration of the rights of the company, viz., 1913.

None of the cases cited in the opinion of the lower court, nor any case relied upon by appellees, upon this point, show that any condition of holding on the part of the railway company was involved other than one of an express or implied indefinite duration. Where the rights of the company are limited in years, the cases hold that upon expiration of the period of limitation, the company's rights, in so far as they exist in the company itself, cease and terminate, and the rights of ownership, then existing, are enforceable.

In Charleston etc. Ry. Co. v. Hughes, 70 Am. St. Rep. 20, the general questions involved in a suit by an owner against a railroad company in possession are elaborately discussed. The case is perhaps the fullest of the reported cases on the subject. Late Justice Lamar was one of the interested parties litigant as well as a participating attorney in the suit. The case is cited as authority in many federal decisions, including a very late case quoted hereinabove.

The opinion shows that in 1872 the Port Royal Railroad Company, a corporation of the State of Georgia, located its line of road across the land of one Holt under a deed from Verdery, trustee. The railroad company entered into possession and built on the land "a part of its tracks which were necessary to a com-

plete construction and operation of the railroad which it was authorized by its charter to build".

In 1896 Mrs. Hughes, W. K. Miller, and J. R. Lamar presented a petition to the judge of the Superior Court setting forth that they were the owners of the land in the possession of a receiver, which land was described in the deed from Holt to the Port Royal Railroad Company; that upon the same there had been erected railroad tracks which were then in possession of the receiver and in use as a part of the railroad yard and terminals in the City of Augusta; that Mrs. Hughes became entitled to possession of the property upon the death of her mother in 1894, and *that she subsequently conveyed an undivided half interest in the same to W. K. Miller and J. R. Lamar.*

The defendant railroad company answered the petition by pleas setting up defenses, in the main, similar to the defenses pleaded in the pending suits. A demurrer to the plea was sustained and the ruling became the basis of an assignment of error. The suit went to trial and judgment was entered for the plaintiffs against the defendant for the land in dispute, directing a writ of possession to issue.

The contention of plaintiffs was that the railroad company had acquired the interest of a life-tenant alone and that Mrs. Hughes and her co-defendants, by conveyance from her, were remaindermen.

In the course of the opinion it is said:

> "If a life-tenant could not convey to a railroad company for a right of way the interest of remainderman, the most solemn judgment that could

be rendered in condemnation proceedings, to which the railroad company and the life tenant alone were parties, could not operate as an estoppel upon the remainderman. * * *

"Therefore a railroad company which sees proper to construct its railway over land where the title is in the condition above referred to acquires the interest of all those with whom it deals by negotiation, or against whom it proceeds by condemnation, but takes the risk of other persons interested making claims in the future, whether they be left out of the negotiations or the condemnation proceedings by mistake or from necessity. In the present case, condemnation proceedings against the assignee of the life tenant, to whom the entire amount awarded as damages was paid, is pleaded in bar of the right of the remainderman in the same property to have compensation for her interest after the termination of the life estate. This cannot be the law. For if so, the right of the legislature to confiscate in the interest of public improvements under the guise of condemnation proceedings would be complete, it being only necessary that one person who was interested in the property should have notice, and by such notice the interest of every other person would be held to pass, although ignorant of the proceedings under which their property was taken. * * *

"When a railroad company, without warrant or authority, enters upon the land of another, it is, as a general rule, no less a trespasser than any other person who is guilty of an act of a similar nature. If, however, a railroad company enters upon the land with the consent of the owner, or under license from him, and the property thus taken possession of becomes such a necessary component part of its railroad that to surrender its possession would interfere seriously with the interest of the company, the landowner, although entitled to compensation for his property, might, by his conduct in allowing the entry upon his land and permitting the com-

pany to so use it as that it could not be abandoned without great prejudice to its rights, estop himself from asserting against the company the legal title to the property by an action of ejectment. The propositions above stated are simply the application of familiar principles of law which govern in all transactions of the character above referred to, whether the controversy be between natural persons alone, or between such persons and corporations, and whether the corporation be public or private. A railroad corporation, being one charged by the law with the performance of certain duties to the public, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line of railway, of which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to the possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight, and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy. That a railroad corporation has a right to

deprive a person of his property for its uses by doing acts which in an individual would be dealt with as a trespass is not contended for; but when a railroad company enters upon land and constructs its road without lawful authority, and the landowner acquiesces in the wrongful act and the consequent appropriation of the property to a great public use until the same has become a necessary *component part* of the property required by the railroad to perform its public duties, such landowner will be held to have waived his right to retake the property, and will be remitted to such other remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated. If this is the case in reference to unlawful entry, for a stronger reason the same result would follow, if the entry by the railroad company in the first instance was by the authority or consent of the landowner, even though it be under a parol license and the legal title to the land still remain in the landowner. The current of modern authority sustains the proposition that when a railroad company is in possession of land, using it as a right of way, although not having acquired the legal title thereto, the landowner would be estopped from ejecting the company from the premises if it was shown either that the original entry was with his consent, or that the entry without his consent was so long acquiesced in that to allow the company to be ejected would either dismember the property of the company, or essentially interfere with its ability to discharge the public duties incumbent upon it. This, however, is subject to the qualification that the landowner is entitled to compensation for his property and this must be ascertained and paid to him before the corporation is vested with a complete right to hold and enjoy his property as its own.

"In the case of Indiana etc. Ry. Co. v. Allen, 113 Ind. 581, the general rule is stated to be, that when land is seized by a railroad company without right

the owner may maintain ejectment; but where there has been an acquiescence on the part of the owner until public rights have intervened, such action will not lie, but the landowner will be confined to a recovery of compensation. In Louisville etc. Ry. Co. v. Beck, 119 Ind. 124, it was held that:

> 'A landowner who stands by without demanding compensation, until a railroad company has so far completed and put in operation its road over his land as to involve the public interest, can neither enjoin the company nor maintain ejectment to recover his land. The only remedy left to the landowner, in such a case, is to proceed within the proper time to have his damages assessed and enforced against the railroad company.'

"In the case of Galveston etc. R. R. Co. v. Pfeuffer, 56 Tex. 66, it was held that where land was appropriated by a railroad company without authority the right of the owner to compensation was not waived by his standing by and permitting the company to construct its road over his land, nor was his right to recover the land lost if the company refused to make compensation. In the case of McAulay v. Western etc. R. R. Co., 33 Vt. 311, 78 Am. Dec. 627, it was held, where a landowner acquiesced in the occupation of his land for the construction of a railroad, without requiring prepayment of damages upon a contract for future payment by the company, and the road was constructed and put in operation, that he could not afterward, on failure to obtain payment, maintain ejectment or trespass for the land: See, also, Roberts v. Northern Pac. R. R. Co., 158 U. S. 1; 3 Elliott on Railroads, sec. 1049. In those cases where it has been held that the landowner would be entitled to bring suit against the company in ejectment, and where a judgment in ejectment was allowed to be rendered, it was also held that upon appropriate pleadings the issuing of a writ of possession would be stayed until the company could be

allowed a reasonable time in which to acquire title to the property, either by purchase or condemnation, or that the enforcement of such a judgment in ejectment would be enjoined for a similar reason: Pittsburg etc. R. R. Co. v. Jones, 59 Pa. St. 433; Conger v. Burlington etc. Ry. Co., 41 Iowa, 419; Jacksonville etc. Ry. Co. v. Adams, 33 Fla. 608. In the case of Young v. McKenzie, 3 Ga. 31, it was held that an action of ejectment against a bridge company to recover property in its possession, and necessary for the purpose of building the bridge, but to which the title had not been acquired either by purchase or condemnation, should be enjoined until the bridge company should have a reasonable time to comply with the terms of its charter in reference to condemning the property for its use. In this case there had been an attempt to acquire the land by condemnation, which failed for the reason that the proceedings before the appraisers were recorded in the wrong place. Under color of this authority the land was entered upon and the bridge built, and this was one of the reasons which brought the court to the conclusion that in equity the company should not be ejected until an opportunity had been afforded it to acquire the land by condemnation. * * *

"We are of the opinion that the petitioners in the present case have waived their right, if any they had, to insist in the first instance upon a judgment in ejectment against the railroad company, not by anything they have done before they instituted their suit, but by the way in which they have brought their suit and the character of the same and of the relief prayed in the original petition. The assets of the Port Royal and Augusta Railway Company were in the custody of a court of equity through the medium of a receiver, and he had possession of the property now in controversy. The petitioners did not apply to this court for leave to go into a common-law court and assert there a strict and technical common-law right; *but*

they applied to this court of equity to be allowed to come in and make themselves parties to the pending suit, and set up their right in such suit against the receiver and the company which was represented by him; and they prayed for a judgment declaring them to be the owners of the property described in their petition, and that they be placed in possession of the same, if the court should decide in their favor. * * *

"Under the rulings we have made, the only question to be determined upon another trial of this case would be, what compensation should be paid to the petitioners for the interest of the remainderman in the property? As all other questions are finally settled by this decision, direction is given that this single issue be submitted to a jury, and that they determine it in accordance with instructions given by the trial judge, following the rulings we have made. When the amount to be paid to the petitioners is thus ascertained, a decree should be entered, allowing the railway company a reasonable time in which to pay the amount thus found, and upon payment of the same, the title to the property to vest in the railway company. Upon a failure to pay the same within the time limited, the right of the company to acquire the property should be decreed to be lost, and a writ of possession should issue to enforce the judgment in ejectment already rendered in the case."

Again in Richards v. Buffalo etc. R. R. Co., 137 Pa. St. 524, it is shown that parties purchasing land subsequent to the entry thereon of a railroad company acquire *whatever rights in the land itself the vendor has, and may enforce those rights in the same manner as the vendor might himself.*

"It clearly appears that the New Castle and Franklin Railroad Company, predecessor of defendant company, entered upon the land in contro-

versy and constructed its road under and in pursuance of the grant aforesaid. There was no evidence tending to show that the land was appropriated for railroad purposes by either company by virtue of its charter powers, or otherwise than under the grant of right of way. In other words, unless defendant company had a right of possession under the alleged grant in connection with facts sufficient to constitute an estoppel, plaintiffs below were entitled to recover. * * *

"If the railroad company, through its agent, Mr. Loy, knew Mrs. Cousins owned the land in controversy, it should have procured a right of way executed by her in person, or by her duly constituted attorney in fact. Instead of doing so, it was guilty of the folly of accepting a grant from one who was neither owner nor the duly constituted attorney in fact of the owner. If the company actually knew the fact that Mrs. Cousins owned the land, how could it be deceived or misled by her alleged acts and declarations indicating the contrary? And on what principle can she or her vendee be estopped from asserting and proving the truth of that fact? If vitality can be thus infused into an unauthorized grant, it would be a very convenient way of circumventing the statute of frauds and perjuries. We think the learned judge was right in saying,

> 'If the railroad company knew the truth at the time they took the grant, the plaintiffs would not be estopped from showing the truth now.' * * *

"There is nothing in the record that would warrant a reversal of the judgment; but, while that is so, it would be inequitable, in view of all the circumstances, to permit it to be enforced without giving the appellant an opportunity of condemning the land, and acquiring the right of way in the manner prescribed by the act of assembly in such case made and provided. This can be done by ordering a stay of execution for sufficient length of time to enable the company to appropriate the land according to law.

> "Judgment affirmed; and it is ordered that upon payment of costs the execution be stayed for four months; and in the meantime the company, defendant below, may proceed to condemn the land, and acquire the right of way according to law."

There is a vast distinction between recovery of damages to property and the enforcement of legal rights pertaining to title in land itself. The foregoing cases and the many cases cited in them show that upon the expiration of the estate acquired by a railroad the rights of the then owner are enforceable in an appropriate suit, such as a proceeding in equity to determine the rights of the parties, taking into consideration intervening public interest.

THE REMEDY WHICH THE LOWER COURT HELD TO BE THE ONLY REMEDY OPEN TO APPELLANTS IS AN ACTION FOR DAMAGES FOR THE TAKING OF THE LAND.

The defendant, Southern Pacific Company, is in possession; the company is a public service corporation; appellants claim that only a small portion of the land occupied by the defendant Southern Pacific Company is necessary for the continuance of the service of the company to the public, and that public convenience is interested only to that extent; the defendant company claims that the whole of the land involved is necessary for its use in its service to the public.

Can it be said that final relief in either ejectment or damages would be as efficient as the relief which a court of equity can give? In Stuart v. Union Pacific Co., supra, it is held that relief which is conditional upon

the surrender of a claimed right is not complete and adequate. Plaintiffs claim the right of possession of a part of the land; it is not plain that they can sue in ejectment; if they sue in damages they surrender all claimed right of possession.

> "A remedy cannot be regarded as plain, complete and adequate when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits."
>
> Stuart v. Union Pacific, supra, p. 757.

In the Stuart case the controversy was over a strip of land four hundred feet wide which was in dispute between the complainant and Union Pacific Railroad Company, a public service corporation, as appears from the following:

> "*What really is the subject of the adverse claims of the parties is a strip four hundred feet in width along the appellee's railroad.* Part of this is in the actual possession of the appellee, is occupied by permanent and costly railroad structures and is being used as a right of way for strictly railroad purposes. * * * In addition, there is a pronounced and bona fide dispute as to how much of the strip has been occupied and used as a right of way; the appellants insisting that this occupancy and use have been confined to twenty-five feet or less on either side of the central line of the railroad, and the appellee insisting that they have extended to fifty feet or more on either side. In these circumstnaces, *it is apparent, as we think, that the appellants are entitled to a hearing and decision as to what extent the appellee is entitled to occupy and use the tract as a right of way;* that they are not entitled to oust the appellee from its actual possession or to interrupt the operation of its railroad, *and that their suits*

can be completely and adequately determined by a suit in equity in the nature of one to quiet title, but not otherwise * * * There may be cases in which an action for compensation or damages under the statute would afford a plain, complete and adequate remedy, but this is not such a case, for in the absence of a prior determination of the dispute respecting the width of the strip actually occupied and used as a right of way, such an action could not be maintained without either conceding the greater occupancy and use asserted by the appellee, or risking a recovery of less than the actual damages. A remedy cannot be regarded as plain, complete and adequate when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits."

The foregoing opinion is based upon Northern Pacific Railroad Company v. Smith, 171 U. S. 260; 43 L. ed. 157 in which case it is plainly and expressly said that an owner who has allowed a railroad company to construct its line over his land may not sue in ejectment as to the land essential to the operation of the road, but *must sue in equity* or under a statute if such exists. In that case it is said:

"There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. *His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes.*"

The words of this case are the ruling of the United States Supreme Court; they are unmistakable.

> "The strength of the plaintiff's appeal to have its bill entertained is in its contention that a suit for damages would not enable it to get that to which it is entitled.
>
> "This feature of the case of the plaintiff was recognized in Tompkins v. International Paper Co., 183 Fed. 773; 106 C. C. A. 529, and it there saved the bill from dismissal. It cannot at this stage of the case be found that this is not the situation of the present plaintiff. Thus seems to stand the case without reference to the equity rules. By what token, however, can these rules be ignored? They are directly applicable to the question now raised and disposed of. Rule 22 (198 Fed. xxiv, 15 C. C. A. xxiv) expressly provides what shall be done 'at any time it appears' that the suit should have been brought at law. More than this, Rule 23 commands us not to dismiss a bill on this ground. The case may be proceeded with, and when it appears, if it does develop, that this case should be tried at law and the amount of damages assessed by the verdict of a jury, this may be done."
>
> Goldschmidt Thermit Co. v. Primos Chemical Co., 216 Fed. 382.

> "Reliance is placed upon rule 23 of the new equity rules (198 Fed. xxiv, 115 C. C. A. xxiv), which substantially provides that matters ordinarily determinable at law arising in equity suits shall be determined in the same suit according to the principle applicable without transferring the case to the law side of the court."
>
> American Car & F. Co. v. Merchant's Despatch Trans Co., 216 Fed. 908, 911.

> " 'Equity' said the court, 'will frequently interfere to remove difficulties in land titles, where a

party cannot proceed without difficulty at law; where the conveyances are lost, or in the possession of the opposite party; or where the parties are numerous, and the proof hard of access; and in many such cases it will lighten the burden, and settle many controversies, and bring them into a small scope. And where the title is purely legal, for such and similar causes to those we have enumerated, equity has carved out a branch of jurisdiction, and a class of bills, termed in the books ejectment bills, in which not only the title is made clear, but the possession decreed also."

"It is true that bills to make legal titles which are valid against all the world, except two descriptions of persons, recorded titles, and thus to protect them from creditors and innocent purchasers, have not been frequent. But if such bills cannot be allowed under the one state of conveyances, it must certainly be said that there is a defect of justice in our country. *A court of common law can give no relief in such a case,* and if equity cannot do it then is the case a hopeless one. If, however, the principles which govern courts of equity are examined, it will be found that there are many circumstances in this case, independent of defective conveyances, which sustain the jurisdiction.

See also Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 449 (35: 1063)."

Sharon v. Tucker, 144 U. S., 545 (36 L. ed. 536).

In United States v. Western Union Telegraph Company, 160 U. S. 53; 40 L. ed. 337, the following language is found:

"'if the controversy contains any equitable feature, or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of

it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority."

In Davis v. Wakelee, 156 U. S. 680; 39 L. ed. 578, 584, it is said:

> *"It is a settled principle of equity jurisprudence that if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit* (quoting many cases). *Where equity can give relief plaintiff ought not to be compelled to speculate upon his chance of obtaining relief at law."*

The suits being in their nature suits of equitable cognizance are properly on the equity side of the court; as such they should be tried under the rules and procedure obtaining in equity. If a suit be of equitable character, or belongs to one of the general classes of suits in equity, it should be tried in equity under Rule 23, even though a jury may need to be called.

> Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 769; same, 216 Fed. 383.

Rule 23 serves the desirable purpose of permitting all suits in equity—of an equitable character—to remain on the equity side of the court and at the same time giving to the parties, if they are so entitled, their right to a trial by jury.

> "The above cases will suffice to blaze for us the path upon which to travel. It is to be observed, however, that Root v. Railway was decided before the adoption of the Equity Rules promulgated November 4, 1912, and therefore before we had Rules 22 and 23. The administrative policy enjoined upon us by these rules is not to permit plaintiffs

to be hampered by procedure objections on the ground that complaint had been made to the wrong court, but, while preserving to defendants all their rights in the disposition of cases, nevertheless to dispose of them by having them determined by that court to whose decision they are properly subject.

"The spirit and intendment is that the question by what tribunal the case should be decided is to be determined when the question can be decided in the full light of all the information obtainable. Plaintiff is to have accorded to it its right to equitable relief in form and method of procedure, and the defendant is to be given full protection in the assertion of its right in a proper case to have it submitted to a jury."

Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 769, 775.

Likewise Whitehead v. Shattuck, supra, was decided before we had Rules 22 and 23 and, under those rules, we venture the assertion that jurisdiction in equity in Whitehead v. Shattuck would have been sustained, for in its character it was a suit in equity and, under Rule 23, the complainant would be permitted to have the suit determined by that court to whose decision it is properly subject and at the same time the defendant would be given full protection in the assertion of his rights to have it, by reason of his possession, submitted to a jury.

It accordingly seems that no ground longer remains for federal courts to decline jurisdiction in suits in equity, brought under a state statute, enlarging the class or the equitable rights under such statutes as embrace any one of the large heads of equitable jurisdiction. Of such statutes none is more often invoked than

the statutes providing for the removal of clouds from title.

All the authorities cited hereinabove tend to one end, and that the sustaining of an equitable principle which has existed since the foundation of courts in equity, namely, the giving to complainants the right, in equity, of correcting wrongs wherever there appears no plain, adequate, complete, efficient and practical remedy in an action at law. If, too, the remedy in an action at law is at all doubtful, jurisdiction in equity should not be and has not been denied complainants.

> "It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit." (Citing many cases.)
>
> Davis v. Wakelee, 156 U. S. 680; 39 L. ed. 578, 584.

And further, there may even be a legal remedy, and yet equity will not decline cognizance.

> "It is objected that equity can exercise no jurisdiction in the case, as adequate relief may be obtained at law.
>
> "There may be a legal remedy, and yet if a more complete remedy can be had in chancery, it is a sufficient ground for jurisdiction."
>
> Wylie v. Coxe, 15 How. 415; 14 L. ed. 573, 5.

Once having acquired jurisdiction, a court of equity may grant any appropriate relief, and there is no combination of circumstances so intricate which it may not analyzie, solve and adjust.

In Sharon v. Tucker, 144 U. S. 545; 36 L. ed. 535, 6, it is said:

"The form of relief will always be adapted to the obstacles to be removed. *The flexibility of decrees of a court of equity will enable it to meet every emergency.*"

EVEN IF THE COMPLAINANTS HAD A PLAIN, ADEQUATE AND COMPLETE REMEDY IN AN ACTION AT LAW, THE LOWER COURT SHOULD HAVE RETAINED THE SUITS FOR TRIAL IN EQUITY BECAUSE "ANOTHER FEATURE IS INJECTED INTO THE CONTROVERSY HERE WHICH IS CONTROLLING. THE DEFENDANTS NOT ONLY JOINED ISSUE WITH THE PLAINTIFF TOUCHING THE EQUITABLE CAUSE AS PLEADED BUT THEY HAVE SET UP A LIKE CAUSE" AND "AT THE SAME TIME THEY HAVE INTERPOSED ONE OR MORE EQUITABLE DEFENSES. BY SO DOING THEY HAVE WAIVED THEIR OBJECTION TO THE EQUITABLE JURISDICTION, AND CAN NOT NOW BE HEARD TO INSIST UPON THE LEGAL REMEDY". Pacific Coal & Trans. Co. v. Pioneer M. Co., 205 Fed. 582.

It will be observed that the lower court refused to consider the effect, upon its jurisdiction, of the defendants' having answered to the merits; in the opinion of the lower court the answer is not referred to once. In explanation of the court's silence in this regard, we feel it due the lower court to say that, in reply to our request that the court should supplement the opinion by words showing that we urged the point of waiver, here made, and the point that, having answered the original bill to the merits, the defendants' motion to dismiss was improperly and irregularly made, had no place in the record and should not be considered, the court stated that the omission to refer to those

matters was solely because the court considered them irrelevant.

From the earliest period in Chancery practice it has been the rule that all technical objections must be taken *in limine*—at the threshold—and that unless so taken they are deemed to have been waived. This was the rule in the English Chancery Courts, and is the rule in the federal and state courts.

We deem the points relevant, and, in support thereof, we cite the following authorities, in addition to Pacific Coal & Trans. Company v. Pioneer M. Co., supra:

1 Dan. Ch. Pr. 555, 630;

Kilbourn v. Sunderland, 130 U. S. 505, 14; 32 L. ed. 1008;

Reynes v. Dummont, 130 U. S. 354, 395; 32 L. ed. 934-43;

Tyler v. Savage, 143 U. S. 97; 36 L. ed. 89;

Wylie v. Cox, 56 U. S. 15; 14 L. ed. 753;

Oelrichs v. Spain, 15 Wall. 211; 21 L. ed. 43;

Lewis v. Cocks, 23 Wall. 446; 23 L. ed. 70;

Brown v. Lake Superior Iron Co., 134 U. S. 530; 33 L. ed. 1025;

Allen v. Pullman, 139 U. S. 658; 35 L. ed. 305;

Preteca v. Maxwell, 50 Fed. 677;

Reynolds v. Watkins, 60 Fed. 825;

Lone Jack International Mining Co. v. Megginson, 82 Fed. 89, 91;

Trust Co. v. Norwich, 71 Fed. 83;

Hollins v. Brierfield, 150 U. S. 381; 37 L. ed. 1115;

Elder v. McClaskey, 70 Fed. 555;

Waterloo Mining Co. v. Doe, 82 Fed. 45,

and an unbroken line of federal court cases, cited in the foregoing.

In 5 Ency. U. S. Sup. Ct. Rep. (p. 825), it is said:

> "It may be stated as a general rule that the objection to the exercise of jurisdiction by a court of equity on the ground that there is an adequate remedy at law, should be taken at the earliest opportunity, and before the defendant enters upon a full defense. * * * Where the existence of an adequate remedy at law is apparent on the face of pleadings, the objection should be taken by demurrer; where the defect is not thus apparent it would seem the objection should be raised by plea or answer."

This is also the rule as laid down by Mr. Daniell in his work on Chancery practice, where it is said:

> "If the objection on the ground of jurisdiction is not taken in proper time, namely, either by demurrer or plea, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it except in cases where no circumstances whatever can give the court jurisdiction. * * * Where the want of jurisdiction appears on the face of the bill, advantage should be taken of it by demurrer."
>
> 1 Dan. Ch. Pr., (6th Am. Ed.) p. 555.

And again at page 630:

> "We have before seen that an objection on the ground of jurisdiction must be taken either by demurrer or plea, before answer; otherwise, the court will entertain the suit, although the defendant may object to it at the hearing, unless it is in a case in which no circumstance whatever can give the court jurisdiction."

And in a note thereto it is said:

> "In general, when a court of equity has jurisdiction of the subject matter, the defendant, after the plea or answer is filed, cannot raise, as a new defense, the objection that the legal remedy is plain, adequate, and complete. This defense should be taken by demurrer, when apparent on the bill. Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. (l. c.) 1008, 9."

In Cobban v. Conklin, 208 Fed. 231, a case decided by the Circuit Court of Appeals for this circuit, in referring to the rule that in the federal courts an action to quiet title cannot be maintained where the complainant has a plain, complete and adequate remedy at law, the Court said:

> "But the rule was devised and the statute was enacted mainly to secure to the defendant the privilege of a trial by jury, and this he may waive. If in a suit in equity he answers and submits to the jurisdiction of the court, he cannot thereafter object that the plaintiff has a plain, complete and adequate remedy at law, provided that the subject matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for a court to grant the relief sought." (Citing long list of cases.)

In jurisdictions not subject to the equity rules of the U. S. Supreme Court, it has been the practice that an amendment of a bill, after answer filed, which is immaterial and does not change the cause of action, but merely sets out more clearly the cause of action alleged in the original bill, does not alter the rule, and does not enable a defendant who has answered the original bill to demur to such amended bill upon any

technical grounds to which the original bill was open. This is the rule as stated by Daniell:

> "An amendment of the bill does not, however, enable a defendant who has answered the original bill to demur to an amended bill upon any causes of demurrer to which the original bill was open unless the nature of the case made by the bill has been changed by the amendments."
>
> 1 Dan. Ch. Pr., 409.

The rule as laid down by Mr. Daniell is followed in 1 Enc. Pl. & Pr., 490:

> "After an amendment of a bill in a material matter the defendant may plead, answer, or demur to the same as if it were an original bill no matter what may have been the state of the pleadings before the amendments was made and he is entitled to a reasonable time for that purpose.
>
> "An amendment of the bill does not, however, enable a defendant who has answered the original bill to demur to an amended bill upon any cause of demurrer to which the original bill was open, unless the nature of the case made by the bill has been changed by the amendment."

And, again, in Vol. 6, at page 414:

> "A demurrer to a bill or any part thereof is overruled by a plea either to the whole or the same part thereof. So, also, a demurrer to the whole bill or to a part of it is overruled by an answer to the bill or to the same part of it; and defendant cannot, after he has answered the original bill, if the plaintiff amends, put in a general demurrer to the whole bill, because the answer will overrule the demurrer."

The new equity rules have of course abolished demurrers and substituted therefor motions; if a defend-

ant who has answered without making technical objections, should later move upon any ground of such objection, his answer, *by virtue of the implied waiver accompanying it and taking effect upon its filing,* would overrule the motion; if the complainant amends the bill, setting up no statement of a new cause of action the waiver is not extinguished, nor is the right to object by defendant, upon grounds open to the original bill, revived; and this result is given effectual expression in Rule 32 in forbidding, in that it does not permit, such a useless step as filing a motion by defendant, after once answering, and in limiting such defendant to a new or supplemental *answer.*

Equity Rule 32 states:

> "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as in case of an omission to put in an answer."

The foregoing rule has precedent in many English decisions in Chancery:

> "Defendants having answered and denied several charges in the bill, plaintiff thought it necessary to state several conversations very much at length, and for that purpose amended his bill. This amended bill was referred for impertinence and the master reported it impertinent. Plaintiff again amended his bill, and to the second amended bill one of the defendants put in a demurrer to the whole bill for want of equity. Plaintiff now moved that this demurrer be taken off the file for irregularity; and the main objection made to

the demurrer was that it was in fact overruled by the answer put into several of the facts of the original bill which remained a part of the amended bill; that these answers remaining still of record must be taken notice of by the court, and that these answers were inconsistent with the general demurrer which extended as well to the remaining parts of the original bill as to the additions made on the amendment.

"The Lord Chief Baron and Hotham B. were of opinion that as the answer remained part of the record, the court might take notice of the contents so far as to determine a demurrer to be irregular, which went to cover the parts of the bill which were before answered; and if this appeared to be so, it was as fatal to the demurrer, as if both answer and demurrer had originally belonged to the same record, and that as to the objection made to the general rule, that the plaintiff might state a distinct case by his amended bill, the answer is that when the case happens that the plaintiff makes a perfectly new case by the amended bill, the court would not consider an answer to a few formal or immaterial passages in the original bill which might remain a part of the amended bill, as any answer at all; but here it seems admitted that several substantial passages are answered.

"Demurrer to be taken off the file and suppressed."

Atkinson v. Hanway, 1 Cox Eq. 360 (1787).

The same rule was enunciated in other cases decided by the English courts.

In Ellice v. Goodson, 3 M. & C. 653, decided in 1838, the Lord Chancellors said:

"This is the case of a bill containing very long and complicated statements of matters and transactions to which the defendant put in an answer.

The plaintiff then amended his bill, and so far as I have been able to look, I do not find (nor indeed was it so argued) that the matter alleged to be multifarious was introduced by the amendments. On the contrary, the whole of the matter on which the objection of multifariousness is grounded is to be found in the original bill.

"The defendant's counsel put the case upon the ground that you must take the amended bill as the record; and that the court is not at liberty to look into it for the purpose of seeing what are amendments and what constitutes original matter. Well, supposing that to be true, as a general proposition, what have I upon the record? I have a bill (taking the amended bill as constituting the record of the bill) which states a great variety of matters, as to by far the greater part of which there is an answer; and I have also a demurrer to the whole, that is, to all that which has been already answered. I have thus a demurrer and an answer applicable to the same bill. It is clear that if this demurrer had been now put into the original bill, it could not have been sustained. And if I am to look at the amended bill as one record, and to look also at the answer as part of the same record, there is an answer to a part of that which the defendant, by demurrer, says he is not bound to answer; so that the answer overrules the demurrer.

"In considering the answer to an amended bill, it is clear you must take the two answers together, the two constituting the entire answer to the bill as it exists after the amendment. The defendant cannot justify repeating, by his answer to the amended bill, what he has stated in answer to the original bill, for it would clearly be impertinent for him to do so. He may introduce anything qualifying his former statements; but he cannot substantially repeat what he has said in his former answer, because to that there is already an answer, and all he has to do is to complete the record. He can no more demur to that which he has before

answered than he can answer it. This appears to be so perfectly clear in pleading and principle that I am glad to hear the Vice Chancellor has not expressed any opinion the other way.

"What would be the course if the circumstance were such as Lord Eldon in Ritchie v. Aylwin (15 Ves. 79) supposed might arise, it is unnecessary for me to consider. The case supposed by his Lordship might certainly occur; that is to say, the plaintiff might, after answer, so amend his bill as to make an entirely new case, so that the original bill would be, as Lord Eldon expresses it, *in nubibus;* and, of course, the answer to it would follow the same fate. Lord Eldon thought he could not let in the plaintiff to make, by way of amendment, what was virtually a new case, without also leaving it open to the defendant, in some way or other, to avail himself of the same defense as he might have resorted to had the case been brought forward at first. One sees the justice of that * * *

"*If, however, the case upon the amended bill is not a different, but substantially the same case, no such difficulty can arise.* Accordingly, in Atkinson v. Hanway (1 Cox 360), although the barons differed as to the mode of dealing with the objection, they all concurred in the conclusion, that if the same matter was the subject both of an answer and a demurrer, the answer overruled the demurrer; and that just as much where one was to the original and the other to the amended bill, as where both were to the amended bill. I never entertained the least doubt that such must be the conclusion if the facts brought the case up to it."

In Attorney-General v. Cooper, 8 Hare 166, an information and bill was filed to enforce the performance of the trusts upon which some of the defendants were seized of a meeting-house and premises—for an account of moneys which had been received on like trusts, under

a will; to have it declared that J. B. M'Crea, one of the plaintiffs, continue the lawful minister of the congregation of said meeting-house and to restrain the trustees from preventing him from officiating as such minister. John Smith, one of the defendants, answered the original bill. The bill was then amended, by introducing other statements, to show the constitution of the society or congregation, the regularity of the appointment of the plaintiff, M'Crea, as the minister, and the illegality of the proceedings adopted for removing him. The original bill had asked for the appointment of new trustees of the meeting-house and other property. The amended bill stated that the defendant, John Smith, was a member of the congregation; and in the amended bill the prayer for the appointment of new trustees of the property bequeathed by the will was omitted. To the amended bill John Smith demurred for want of equity, want of parties, misjoinder of plaintiffs and multifariousness.

Attorneys for the demurrer, relied first, upon Wyllie v. Ellice (6 Hare 505) as establishing the proposition that the defendant might demur to the amended bill, notwithstanding he had answered the original bill, and even supposing the substance of the case remained the same.

The Vice Chancellor expressed his opinion to be, that the alteration by the amendment had not, with reference to the demurrer, raised any case which had been excluded by the original bill; and proceeded,

> "If it were not for the case of Wyllie v. Ellice there would have been no pretence for this de-

murrer. I take it to be clear, that when a party has answered an original bill, he cannot demur to the bill, when it is amended, unless the amendment makes what Lord Eldon has described as a new case. If it were otherwise, a new sort of practice would be introduced."

The Vice Chancellor then proceeds to review and distinguish Wyllie v. Ellice as having changed the parties, etc., by the amended bill, and concluding with respect to that case:

"It was upon that ground that I decided the case of Wyllie v. Ellice. If it be true that the legitimate consequences of that decision be such as are now pressed upon me, I must reconsider Wyllie v. Ellice. I do not think that I have ever decided, or intended to decide, that the fact of a party having answered the original bill is not to be regarded upon the argument of a demurrer to an amended bill.

"Now, in this case, the original information and bill was open to all the objections which arise on the amended information; *and where a party has passed by the time at which he might demur, I think his right to demur does not revive upon the amendment of the bill, by simply praying relief in substance of the same nature as that which was prayed before.* It would be carrying the case of Wyllie v. Ellice very much farther than is necessary;—if not, as I have said, I must reconsider it.

"I think this demurrer must be overruled. I decide it upon the ground that the defendant ought to have taken these objections before, if the objections be valid ones."

The foregoing cases bring the English practice down to the time of adoption (1842) of the rule laid down in present Equity Rule 32, which latter rule was a re-adoption of former Rule 46. The Supreme Court hav-

ing adopted a rule in the premises in 1842, that rule has, since its adoption, continued to control in our federal courts.

As showing that the practice of State Courts is in harmony with the English Rule and Equity Rules 46 (old) and 32 (new), we cite the following state court decisions:

Booth v. Stamper, 10 Ga. (l. c.) 113 et seq.:

> "When the plaintiff is allowed to amend, it is clearly right that defendant should be allowed to demur to the amendment, and if the amendment is material, that is, if it varies the case made in the original bill, it is equally clear that the defendant ought to have the right to demur to the bill as amended, even if he has once demurred and been overruled I see the most satisfactory reasons for all this, but I must say, that I see no good reason for allowing a second demurrer to a bill because an immaterial and trivial amendment has been made.
>
> "However, the right to demur a second time to the whole bill, upon amendment made, applies to cases when the amendment is made and demurrer filed before the answer is put in. For it is also a general rule of Equity practice, that a defendant cannot, after he has answered the original bill, if the plaintiff amends it, put in a general demurrer to the whole bill, because the answer will overrule the demurrer. If, however, the defendant has answered the original bill and an amendment has been made, which materially varies the case made against the demurring party, he will be entitled to demur to the whole bill as amended, even though he may have demurred to its unsuccessfully before amendment."

In Sanchez v. The Electrovibration Co., 4 App. Cas. (D. C.) 453, it was held that, while a defendant in equity cannot, in general, after he has answered the original

bill, put in a general demurrer to the amended bill, he can do so if the nature of the case made by the original bill has been changed by the amendment; quoting Daniell's to the effect that

> "An amendment of the bill, however, does not enable a defendant who has answered the original bill to demur to an amended bill upon any causes of demurrer to which the original bill was open,"

and

> "A defendant in general, after he has answered the original bill, cannot put in a general demurrer to the amended bill, because the answer to the original bill, being still in the record, will in fact overrule the demurrer."

The Supreme Court of Illinois, in Bond v. Pennsylvania Company, 171 Ill. 508; 49 N. E. 546, lays down the rule in the following concise language:

> "The first point made on this record is that, after appellee had answered the original bill, it could not demur to the amended bill upon any ground alleged previous to its answer. The reasons set forth in the last demurrer are that appellant had not, in or by his amended bill, made or stated a case which ought to entitle him to any relief. Inasmuch as appellee had answered the original bill, and, after demurring to it as first amended, asked leave to have its answer stand to the bill as amended, it was precluded from demurring to the bill as secondly amended on any ground that had already been answered, for one cannot answer and demur to the same matter at the same time; and after having answered the original bill, if the same is amended, the defendant cannot put in a general demurrer to the whole bill, because the answer will overrule the demurrer. The right to demur a second time to the whole bill, upon amendment made, applies only to cases where the amendment is

made and the demurrer filed before the answer is put in. Appellee should have confined its demurrer to the matter set up in the last amendment. 1 Enc. Pl. & Pr. 491; 6 Enc. Pl. & Pr., 414, 430; 1 Daniell, Ch. Prac. (6th Am. Ed.) 409. The last amendment did not abandon any of the original grounds for relief, but set up an additional ground."

And so has the rule been declared in Tennessee, the Supreme Court, in State v. Mitchell, 104 Tenn. 336, 58 S. W. 367, saying:

"The general rule is that *an amendment of a bill does not enable a defendant who has answered the original bill to demur to the amended bill upon any cause of demurrer to which the original bill was open.* 1 Daniell, Ch. Prac., 409. 'It was in consequence of the two bills being considered as one that where the defendant has answered the original bill a demurrer to the new bill, which contains matter already answered, will either be taken from the files, as irregular, or considered as overruled by the answer.' Atkinson v. Hanway, 1 Cov. Ch. 360; Ellice v. Goodson, 3 Mylne & C. 653; Dillon v. Davis, 3 Tenn. Ch. 395. 'But if the plaintiff so amend his bill as to make an entirely new case, leaving the original bill, as Lord Eldon expresses it, in nubibus, the answer must be treated as in the clouds, also, and a demurrer would be in order.' Ritchie v. Aylwin, 15 Ves. 79; Cresy v. Bevan, 13 Sim. 354." * * *

"The fourth ground of demurrer challenged the right of a stockholder to maintain such a bill for the use and benefit of the corporation, without requesting the board of directors to prosecute the suit. It must be conceded that this last ground of demurrer was open to defendants when they answered the original bill, and ordinarily the answer to the original bill would preclude the right to demur to the amended bill for this cause. But the amended and supplemental bill undertakes to allege a state

> of facts showing the disqualification of the directors to institute or conduct the litigation, and in other respects, already mentioned, the amended bill makes *an entirely new case.* Hence we think defendants were not precluded by their answer to the original bill from demurring to the amended and supplemental bill."

In Lynn & Co. v. Andrews, 180 Mass. 527; 62 N. E. 1061, the Supreme Court of Massachusetts held that a demurrer to the declaration filed after an amendment *adding a second count* to the original declaration, to which a general answer was filed, must be *restricted* to the *added count,* or to some impropriety in joining the two counts in the same declaration.

In Railroad Company v. Beggs, 85 Ill. 80; 28 Am. Rep. 613, the court said:

> "At a subsequent term there was an amended declaration filed, not differing substantially from the original, except more particularly alleging the duty to provide safe, sure and well constructed and sound railroad bed and track, and sure and safe cross-ties; averring defendants did not furnish same * * * etc.
>
> "It would appear from the transcript before us, there was a general demurrer to the original declaration, but as a plea in bar was subsequently filed, the demurrer was waived.
>
> Defendants below, after the issue had been made up, and the amended declaration filed, put in a plea to the jurisdiction of the court * * *
>
> "This plea, on motion of plaintiff, was stricken from the files, and this is the first error alleged.
>
> "We think there was no error in striking this plea from the files. The amended declaration did not make a new or different case from that set out in the original declaration, to which the general

> issue had been pleaded and issue made up. There was then on file a plea to the merits, which admitted jurisdiction, and it was too late to plead specially to the jurisdiction."

And such is the rule in California, the Supreme Court saying in Wood v. Curry, 49 Cal. 361:

> "The objection that the remedy of the plaintiff was by motion in the original cause, and not by bill in equity, even if well founded in practice (a question upon which we express no opinion) will not be considered. The defendant made no motion in the court below to dismiss the bill, on that or any other ground, but answered to the merits. The cause was then referred to a referee. Under these circumstances, the objection upon the point of procedure made for the first time before the referee, came too late."

And again in Thompson v. Laughlin, 91 Cal. 318:

> " * * * the defendant waived any objection to the remedy (injunction) by answering, without first moving to dismiss the action, on the ground that plaintiff should have proceeded by motion (Wood v. Curry, 49 Cal. 359.)"

In Bank of Woodland v. Heron, 122 Cal. 107 (110), it is said, in referring to the right of a defendant, who had answered, to set up a new defense, the same principle being involved:

> "For it is not sufficient that the new defense proposed be a legal defense; it should also be an equitable defense. (Harding v. Minear, 54 Cal. 502, 506.) This defense under the circumstances was highly inequitable. In Cooke v. Spears, supra, the trial court refused to allow the plea of the statute of limitations by way of amendment, and this court upheld the ruling upon the ground that the amendment was not in furtherance of justice. '*It was*

claimed solely as a legal advantage, to which at one time he would have been entitled; but it is a wise conservation that it should have but its day in pleading and no grace of right after, beyond the extent of justice.'"

The right of a defendant who has once answered to the merits to do other than file a new or supplemental answer within the time allowed under Rule 32, by no conceivable method can be construed to extend beyond the time of an order of court made in that behalf, and under Equity Rule 32, "unless it is otherwise ordered," the defendant must answer again, and may not do otherwise than answer. The rule has been extended much further, many authorities holding that a defendant cannot even answer except as to the new matter.

Winton Motor Carriage Co. v. Blomberg, (Wash.) 147 Pac. 21;

Dyer v. Cramston Print Works Co., 20 R. I. 143; 37 Atl. 632;

Casserly v. Waite, 124 Mich. 157; 82 N. W. 841; 83 Am. St. Rep. 320, and cases hereinabove cited.

In Winton Motor Carriage Co. v. Blomberg, supra, the Court held that where, in a seller's action to replevin an automobile conditionally sold, every issue raised in defendant's answer to the amended complaint by way of counterclaim could have been raised by answer to the original complaint, it was not error to strike from such answer allegations presenting such issue, saying:

"Every issue raised in the subsequent answer to the amended complaint by way of counterclaim for damages for breach of warranty and for a return

of the purchase price paid on the large car could have been raised by answer to the original complaint. By his failure to answer the allegations touching the large car in the original complaint, and stipulating, in the words of his counsel, that

'the only dispute is about the small car',

the appellant waived these claims. Having been waived as matter of defense and counterclaim to the complaint so far as it originally related to the large car, they could not thereafter be asserted as matter of defense and counterclaim to the amended complaint relating solely to the small car. Having waived these matters in the transaction out of which they arose, he waived them for all purposes."

Casserly v. Waite, supra, contains a very satisfactory discussion of this subject, the Court saying:

"It is also contended by relator that complainant having amended its bill, even by bringing in the contractor as a party defendant, relator had the right to file an answer to the amended bill setting up new defenses, or contradictory defenses to those contained in the answer to the original bill. On the other hand, it is contended by counsel for respondant that where a bill is amended, the answer having already been put in, the defendant, if he answers, should answer only as to new matters introduced by the amendment. In this we think counsel for respondent are correct. The amendment to the bill by adding a new party defendant in no way changed the cause of action as stated in the bill, and in no way affected defendant's rights. The amendment was purely formal. It introduced no new matter into the bill, and there was, therefore, nothing in the amendment requiring a further answer by defendant. * * *

"Puterbaugh on Chancery Practice, third edition, 118, lays down the rule that:

'In answering an amended bill, the defendant, if he has answered the original bill, should answer

only those matters which have been introduced by the amendments. In fact, the answer to an amended bill constitutes, together with the answer to the original bill, but one record.'

"The same rule is laid down in Jennings on Chancery Practice, 89. See, also, 1 Barb. Ch. 159, and 1 Daniell's Chancery Practice, 729.

"In Salisbury v. Miller, 14 Mich. 160, it was said:

'It is claimed that it was irregular to proceed to a hearing after the bill was amended without a further answer from Miller or a default. Had any new matter been introduced into the bill, he would have had a right to answer further; but where nothing but the name of a new defendant was introduced, no such step was required, as it in no way changed the aspect of the suit against Miller.'

"See, also, Munch v. Shabel, 37 Mich. 166: But counsel for relator cite 1 Daniell Chancery Practice, 409, as follows:

'Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer making an entirely new defense, and contradicting his former answer.'

"It is contended by counsel for respondent that this rule laid down by Daniell is in conflict with the rule already stated by the same author; that it is broader than the authorities cited for it warrant; and that, giving it the most favorable construction possible, it cannot be held to apply to cases like the one at bar. We are satisfied that the rule laid down by Daniell could not be applied to a case like the present, even if it is the rule applied in some cases."

Dyer v. Cramston Print Works Co., supra, was a case where, on the death of one of the complainants, a bill was amended to obviate the necessity of a bill of

revivor, and the Supreme Court held that defendant was not entitled to set up defenses not contained in his original answer except such as related to matters set forth in the amendment.

However, in federal court practice, under Equity Rule 32, a defendant is required to file a new or supplemental answer unless it should be otherwise ordered by the court:

> "If an amended bill is filed after the original bill has been answered, a pro confesso may be taken against the defendant if he fails to answer the amended bill within the time prescribed by rule or statute unless the time is enlarged. (U. S. Eq. Rule 32.)"
>
> 10 R. C. L. 537.

The rule stated in the foregoing quotation from Ruling Case Law has been followed in principle, though not by direct reference to the rule itself, in numerous federal court decisions, as an instance of which we cite the following:

> "In general, when a court of equity has jurisdiction of the subject matter, the defendant, after the plea or answer is filed, cannot raise, as a new defense, the objection that the legal remedy is plain, adequate and complete. The defense should be taken by demurrer, when apparent on the bill."
>
> Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. (l. c.) 1008, 9.

The rule is founded upon waiver, by defendant, of all technical objections by once answering to the merits.

> "These defendants, therefore, knowing, as they must have done, that the object of bringing them in at all was in order that their claims should be cut

off by the decree, and not having raised the objection of multifariousness until now, come within the scope of the doctrine repeatedly declared by the supreme court, that, if the matters were of equitable cognizance, the objection must be raised in limine, and, if not then made, it should not be entertained. Oliver v. Piatt, 3 How. 333; Nelson v. Hill, 5 How. 127; Story, Eq. Pl., Sec. 284a."

Converse v. Michigan Dairy Co., 45 Fed. 20.

"It is contended by counsel for the appellant that the court erred in overruling his motion to dismiss these causes on the ground that the appellees had a plain and adequate remedy at law." * * * "But, if there had been no waiver, the objection came too late. If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. 1 Daniell, Ch. Pr. (4th Amer. Ed.) p. 555; Reynes v. Dumont, 130 U. S. 395, 9 Sup. Ct. Rep. 486; New Orleans v. Morris, 105 U. S. 600. Good faith and an early assertion of rights are as essential on the part of the defendant as of the complainant. Brown v. Iron Co., 134 U. S. 530, 10 Sup. Ct. Rep. 604."

Levi v. Evans, 57 Fed. 687.

"The objection that an action should have been brought at law instead of in equity, or vice versa, is waived by a failure to interpose it at the proper time in the court of original jurisdiction. Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; Insley v. U. S., 150 U. S. 512, 14 Sup. Ct. 158; Preteca v. Land-Grant Co., 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340; Reynes v. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486. If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, *he must interpose the objection at the threshold of the case* and will

not be heard to make it for the first time in the appellate court."

Union Pac. Ry. Co. v. Harris, 63 Fed. 803.

"It is further urged that it now appears that the complainant has a full, complete, and adequate remedy at law. The general rule is that the objection that the complainant has a complete and adequate remedy at law should be taken at the earliest opportunity, and, if not so taken, the court having the general jurisdiction will exericse it."

Western Electric Co. v. Reedy, 66 Fed. 164.

"The point is made that an action to recover the value in money of lands sold cannot be joined with a suit to cancel patents for other lands, and that the case proven shows no ground of equitable jurisdiction as to the several tracts of land sold by the appellants. But there was no demurrer to the bill, or plea to the jurisdiction in equity. By answering to the merits the appellants waived any right they may have had to object to the power of the court to deal with the case as one in equity, the court having the power to grant the relief sought. Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Brown v. Lake Superior Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; Insley v. United States, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163; Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113. See, also, Southern Pacific Railroad Co. v. United States (decided by this court at the present term) 133 Fed. 651."

Southern Pac. R. Co. v. United States, 133 Fed. 669.

"(2) It is not clear why plaintiff's remedy at law was not adequate. The claim of fraud is not alone sufficient to give equity jurisdiction. U. S. v.

Bitter Root Co., 200 U. S. 451, 472, 26 Sup. Ct. 318, 50 L. Ed. 550. However, a bill which seeks rescission on the ground of fraud is within a recognized head of equity jurisprudence (Tyler v. Savage, 143 U. S. 79, 95, 12 Sup. Ct. 340, 36 L. Ed. 82), and, in such a case, *the question whether the suit is rightfully brought on the equity side* will not be raised by the court on its own motion, but *must be presented by the defendant at the first opportunity.* (Toledo Co. v. Computing Co. (C. C. A. 6) 142 Fed. 919, 923, 74 C. C. A. 89; Warmath v. O'Daniel (C. C. A. 6) 159 Fed. 87, 91, 86 C. C. A. 277, 16 L. R. A. (N. S.) 414.)"

National Leather Co v. Roberts, 221 Fed. 925.

"And, in addition to these considerations, we think we ought not to regard with favor the raising of this objection, for the first time, at this stage of the cause.

"The rule as stated in Daniell's Chancery Practice (Vol. 1, p. 555, 4th Am. edition), is that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550, many cases are cited to establish that 'If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject matter.'

"In Wylie v. Coxe, 56 U. S. 15 How. 415, 420 (14: 753, 755), it is said: 'The want of jurisdiction, if relied on by the defendants, should have been alleged by plea or answer. It is too late to raise such an objection on the hearing in the appellate

court, unless the want of jurisdiction is apparent on the face of the bill.'

"It was held in Lewis v. Cocks, 90 U. S. 23 Wall. 466 (23:70), that if the court, upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by the counsel. To the same effect is Oelrichs v. Spain, 82 U. S. 15 Wall. 211 (21:43). The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery, at the pleasure of the parties interested; but it by no means follows, where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late even though, if taken in limine, it might have been worthy of attention."

Reynes v. Dumont, 130 U. S. 354; 32 L. ed. 934, 945.

"The point is also pressed that the remedy at law was plain, adequate and complete, and jurisdiction in equity therefore wanting. We do not understand counsel to repudiate the stipulation, or to suggest multifariousness or any objection arising upon the rather unusual mode pursued to secure a conclusion in four cases rolled into one, but to contend that the determination of all the matters in issue belongs on the law side of the court. The defendants fully answered the bill, and raised no such objection, and the cause being at issue, and evidence taken, it was ordered on the 23d of February, 1883, by consent, to be heard by the general term in the first instance. On the 24th of March,

1884, the defendant moved to dismiss on the ground of the adequacy of the remedy at law. We have had occasion recently to remark that where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject matter, this objection should be taken at the earliest opportunity and before the defendants enter upon a full defense. Reynes v. Dumont, 130 U. S. 354 (ante, 934)."

Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005, 1008.

"But were it conceded that the bill was defective; that a demurrer must have been sustained; and that the appellant, if it had so chosen to act in the first instance, could have defended its possession and defeated the action,—still the decree of the circuit court must be sustained. Whatever rights of objection and defense the appellant had, it lost by inaction and acquiescence." * * * "After a lapse of nine months,—suddenly its policy changed —it contested where theretofore it had acquiesced."

Brown, Bonnell & Co. v. Lake Superior Iron Co., 134 U. S. 530; 32 L. ed., 1021, 1024.

"It is urged, however, that this court has sustained the validity of proceedings and decrees in suits of this nature, in which it appeared that the plaintiffs had not exhausted their remedies at law, and the cases of Sage v. Memphis & L. R. R. Co. 125 U. S. 361 (31:694), and Mellen v. Moline Malleable Iron Works, 131 U. S. 352 (33:178), are cited as illustrations. But passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset, and when action on the part of the court was invoked. Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the

> scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal."
>
> * * * "If there was a defense existing to the bills as framed, an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defense and objection which must be made in limine, and does not of itself oust the court of jurisdiction. This doctrine has been recognized not merely in the cases cited, but also in those of Reynes v. Dumont, 130 U. S. 354 (32: 934); Kilbourn v. Sunderland, 130 U. S. 505 (32: 1005); Brown v. Lake Superior Iron Co. 134 U. S. 530 (33: 1021)."
>
> Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. ed. 1113, 1115.

It is elementary that all objections on technical grounds may be waived.

In Dennison v. Chapman, 105 Cal. 447, it is said:

> "There was no demurrer interposed to the complaint. It follows, therefore, that all merely technical objections are waived."

In Hollins v. Brierfield Coal Co., 150 U. S. 371; 37 L. ed. 1113, 1115, it is said:

> "Defenses existing in Equity suits may be waived just as they may in law actions, and when waived the cases stand as though the objection never existed."

Certainly then, objections, grounds for which exist at the time of answering and are not raised by answer or motion, thereby being waived, may not be revived by a defendant, if the case stands after waiver "as though the objection never existed."

Rule 29 provides that all objections shall be taken by motion or answer.

The defendants made no objection by answer to proceeding in equity nor any objection whatever until within a few days of date of trial at Sacramento in May, 1915. In March, 1915, the cases were regularly set for trial without objection (Tr. p. 20). During all this time no motion was interposed, a full answer to the merits had been made, and no objection to proceeding in equity, nor any other objection, was made upon any ground.

If appellees wished to object, they should have objected at "the threshold",—"in limine",—"at the outset", "at the earliest opportunity", as the opinions variously put it, but, instead of doing so, they waived their right to object and consented in open court to the trial of the suits at Sacramento on May 25, 1915 (Tr. p. 78, 2nd par.).

As is said in Brown, Bonnell & Co. v. Lake Superior Iron Co., supra,

> "after a lapse of nine months,—suddenly their policy changed—they contest where theretofore they had acquiesced."

and as was said in that case,

> " * * * whatever rights of objection and defense the appellants (appellees) had, they lost by inaction and acquiescence."

It is the rule in all jurisdictions that, if technical objections are not taken at the earliest opportunity, they are waived. In Tingley v. Times Mirror, 151 Cal. 13, it is said:

> "If there is a defect in parties plaintiff apparent upon the face of the complaint, or if it appear therefrom that plaintiff has not the legal capacity to sue, the objection on either of these grounds must be taken by demurrer, or is waived. If these matters do not appear on the face of the complaint, any objection or defense as to them must be taken advantage of by answer, or is deemed to be waived. (Code Civ. Proc. secs. 430, 433, 434.)
>
> Now the earliest opportunity available to the defendant, as these objections could not be urged on the face of the complaint, was to take advantage of them in the original answer, which it did not do."

and the same rule applies to all technical objections, Dennison v. Chapman, supra.

Equity Rule 32 recognizes that, if technical objections to proceeding under a bill filed and served in equity are not made before a defendant answers or in the answer, they are waived, provided, of course, it be competent for a court of equity to grant the relief prayed.

Rule 46, of the Equity Rules of 1842, was substantially the same as new Equity Rule 32. Rule 46 provided:

> "In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer."

It will be noted that nothing is said about putting in a demurrer or plea and this was the rule regarding proceedings after answer before demurrers and pleas were abolished in equity in federal court practice.

It will also be noted that in all other instances under the Rules of 1842, where the rights and duties of defendants in regard to pleadings originally are referred to, the following language is used:

> "it shall be the duty of the defendant to file his plea, demurrer or answer to the bill" (Rule 18); "whenever an injunction is asked for by the bill * * * if the defendant do not enter his appearance and plead, demur or answer" (Rule 55); "it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill" (Rule 94).

It is but reasonable to assume that the Supreme Court had this former rule and practice in mind when drafting the present rules respecting the procedure after amendment; and that it was not intended to alter the entire federal court practice upon a matter founded upon the very principle which prompted the adoption of the New Rules, namely, elimination of all non-meritorious avenues of delay. Manifestly, a defendant could not, under the old rules, demur to an amended bill on any ground to which the original bill was open. The fact, then, that under the new rules, a defendant may raise by answer questions of law which might have been raised theretofore by demurrer, and that the new rules permit of an answer being filed after amendment, does not mean that a defendant, who has once answered to the merits, can come in, on an immaterial amendment being made, and, in effect, demur to the amended bill on any ground to which the original bill was open. It is manifest that such was not the intention of the Supreme Court, unless it be that it was the intention to overthrow all estab-

lished precedent and practice from the earliest proceedings in the High Court of Chancery of England and uniform in chancery courts, both of the United States and of the several States. Such contention could hardly be maintained.

By comparing New Rule 32 with New Rules 12 and 16, the same distinction in use of language will be noted as in the Rules of 1842, and the meaning appears clear and certain. Rule 12 is directed to the first filing on the part of the defendant and permits the defendant to "file his answer or other defense."

Likewise Rule 16 applies to the first filing on the part of the defendant and permits the defendant "to file his answer or other defense."

To hold that a defendant may move to dismiss under the circumstances contemplated in Rule 32 would be to hold that the Supreme Court unintentionally omitted from the rule the words, "or other defense." This charge we shall not suggest that appellees will impute to that court.

Conceding, then, for the sake of argument merely, that the word "answer", as used in Rule 32, read in connection with the same word in Rule 29, could be construed broadly enough, by stretch of imagination, to permit defendant, since he can answer the amended bill, to raise technical objections in his answer thereto, still it remains unanswerable that Rule 32 makes no provision for filing "other defenses", and that is what the defendants herein have endeavored to do.

Every one of the cases which hold defendant to a waiver of technical objections by answering to the merits is a recognition of the reasoning and principle underlying Rule 32, which is that, having answered to the merits, a defendant must go to trial in the cause and if the complainant amends after the defendant has answered, the defendant must answer and answer alone, unless the court (upon cause shown) shall otherwise order.

Having therefore waived all objection to proceeding in the cause in equity and all other technical objections at the time when the complainants filed amended bills, the defendants were privileged to "file a new or supplemental answer" alone (Equity Rule 32), to the amended bills.

The suits should not have been dismissed, because the appellees waived their right to object to the jurisdiction in equity or upon any other technical grounds.

IF THE AMENDED BILLS OF COMPLAINT DO NOT STATE FACTS SUFFICIENT TO CONSTITUTE A VALID CAUSE OF ACTION IN EQUITY, THE SUITS SHOULD HAVE BEEN TRANSFERRED TO THE LAW SIDE OF THE COURT.

Equity Rule 22.

Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 769 (775); Id. 216 Fed. 382 (383);
Corsicano Nat. Bank v. Johnson, 218 Fed. 822;
United States v. Utah Power and Light Co., 208 Fed. 822.

It is apparent upon the record that complainants made no attempt to state a cause of action at law in damages, because of the inadequacy of such a remedy, yet if complainants show, by their amended bills of complaint, a justiciable cause, but not sufficient facts to make the same cognizable in equity, the suits should have been transferred to the law side with only such alteration in the pleadings as would be essential.

IN NO EVENT SHOULD THE SUITS HAVE BEEN DISMISSED ABSOLUTELY, BUT IF DISMISSED AT ALL, THE DECREE OF DISMISSAL SHOULD HAVE BEEN WITHOUT PREJUDICE TO AN ACTION AT LAW.

> "We observe, however, that the decree dismissing the bill is general, and does not preserve to the appellant her right to sue at law, if she so elects. The case is therefore remanded to the circuit court with directions to add to the existing decree a clause that the dismissal ordered is without prejudice to the complainant's right to sue at law."
>
> Sanders v. Devereux, 60 Fed. 316;
>
> Hollins v. Brierfield Coal and Iron Co., 150 U. S. 371; 37 L. ed. 1114 (1118).

THE DEFENDANTS HAVING FAILED TO FILE A NEW OR SUPPLEMENTAL ANSWER TO THE AMENDED BILLS OF COMPLAINT, BECAME, AND NOW REMAIN, IN DEFAULT UNDER EQUITY RULE 32.

Appellants applied for orders for decrees pro confesso which were entered by the clerk of the lower court (Tr.

p. 40). The court set aside said order upon the ground that the same had been inadvertently and inadvisedly entered.

Appellants consider the merit of their position with reference to the decrees pro confesso entered under the foregoing rule to lie in three matters, viz.: (1) the purpose of the rules to speed causes to final determination by eliminating causes of delay, and the rights of litigants to be protected against such disregard of the rules as will defeat that purpose; (2) the existence, at the time the appellees answered, of all the grounds of objection later made by appellees; (3) the reliance by appellants upon the waiver of defendants and the fixed status of the suits as at issue and ready for trial for six months prior to May, 1915.

It has already been pointed out that Rule 32 is declaratory or expressive of a principle announced and applied in many cases; viz., answering to the merits, without objection, waives all objections which may be waived.

The main purpose of the rules, prevention of delay, is afforded its chief means of accomplishment in Rule 32, taken in connection with Rules 29, 22, and 23.

As is said in Boyd v. N. Y. & H. R. Co., 220 Fed. 178:

> "There is nothing novel in embodying and presenting legal propositions in the answer. * * * What is new is the obligation on defendant to show all his propositions at once, whether of fact or law."

Again in the same case we find:

> "Many a judge has heard in succession a demurrer, a plea or two, and several motions before getting to the answer and never seen or thought

> he had a right to see the whole defense at a glance. Whether the panorama now afforded is real reform depends almost altogether upon how sympathetically and skillfully the new procedure is administered."

Again, as indicating the spirit of the new rules, it is said in Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 775:

> "The administrative policy enjoined upon us by these rules is not to permit plaintiffs to be hampered by procedure objections on the ground that complaint had been made to the wrong court."

The "spirit and intendment" is to bring defendant to answer and to hold the case in such status that the questions raised can be decided in the full light of all the information obtainable. As is said in Boyd v. H. R. Co., supra,

> "One who 'demurs generally' nowadays must be understood to do so not only on what complainant shows but also after having his own conscience purged. Thus only is avoided the old and bad habit of trying everything else before stating facts."

Of course, the equity rules have all the force of statutes and of decisions of the United States Supreme Court, and have the effect of such upon all courts subject to them; "they must be applied in all cases that fall within them" (15 L. ed. 901, note, citing cases).

It becomes material, therefore, to consider the meaning of Equity Rule 32; its meaning becomes important, for it controls the court upon this point. While the rule has never been construed in any decision by express reference to it, it has often been approved in principle

and applied. We refer to the preceding authorities on the question of waiver. We might add that when the United States Supreme Court reversed the decree in the case of Thompson v. The Maxwell Land Co., 95 U. S. 391; 24 L. ed. 481 (485), with directions that the "complainants be allowed to amend their bill and that the defendants be at liberty to answer any new matter introduced therein," the principle of the rule was recognized.

The language of the rule is direct, plain and unequivocal: "in every case" [Webster says of "every" that "not one of all considered is excepted" and the Standard Dictionary that it "makes no exception and extends to all"] "where an amendment to the bill shall be made after answer filed"—concededly the situation in the pending record; the defendants answered to the merits, that is, they put in allegations of fact in defense, that being the only meaning in which the word "answer" is used in the rules, new or old, in the several dozens of times in which it is used, as a reference to the rules shows—"the defendant shall put in a new or supplemental answer"—that being the only step open and the word "answer" having clearly the same meaning that it has in the many instances of its use throughout the rules.

If the meaning of the rule be plain, free from ambiguity, it is the duty of the court to give it effect:

> "And when a statute is plain and its meaning is certain, construction has no place or office. The conclusive legal presumption is that the legislative body meant what it said, and the duty of the courts is to give effect to its acts, not to amend or repeal

them. Brun v. Mann, 151 Fed. 145, 157, 80 C. C. A. 513, 525, 12 L. R. A. (N. S.) 154; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; Johnson v. Southern Pac. Co., 117 Fed. 462, 465, 54 C. C. A. 508, 511; Swarts v. Siegel, 117 Fed. 13, 18, 19, 54 C. C. A. 399, 404, 405; St. Paul, M. & M. Ry. Co. v. Sage, 71 Fed. 40, 47, 17 C. C. A. 558, 565; Webber v. St. Paul City Ry. Co., 97 Fed. 140, 144, 38 C. C. A. 79, 83; Grainger & Co. v. Riley, 201 Fed. 901, 904, 120 C. C. A. 415, 418; United States v. Alamorgordo Lumber Co., 202 Fed. 700, 706, 121 C. C. A. 162, 168; First Nat. Bank v. United States, 206 Fed. 374, 377, 378, 124 C. C. A. 256, 259, 260, 46 L. R. A. (N. S.) 1139; Soliss v. General Electric Co., 213 Fed. 204, 207, 129 C. C. A. 548, 551."

Sweet v. United States, 228 Fed. 321 (423) (advance issue No. 5, March 2, 1916).

Rules 12, 16 and 29 are general rules as to when and in what form pleading may be made in the beginning by a defendant. Rule 32 is a specific rule covering "every case" where an amendment is filed "after answer" and limits the pleading to "a new or supplemental answer" by the defendant, and must have been adopted for the acknowledged purpose of the rules, namely, in aid of speeding the cause and preventing delay in proceedings. A specific statute (rule) always prevails over a general statute.

If a defendant answers (and does not make but by silence waives the making of any other defense), and the bill is amended, then (Rule 32) "in every case where an amendment shall be made after answer filed the defendant shall put in a new or supplemental answer. The rule does not say "or other defense".

He will have waived, in that suit, the making of other (technical) defenses, and, besides, the court wants to see the case in the light of the "purged conscience" of defendants, so the defendant is called upon to answer. The suit is in equity, and the court wants all the light that can be reasonably demanded of both parties. There is no provision under Rule 32 for the making of any other defense than by answer. It was open under Rule 29 to appellees to make "other defense" at the time of answering originally.

The amendments contain no allegation of fact, the existence of which was unknown to defendants at the time of answering and of which defendants could not and should not have availed themselves in their answer, under Rule 29. They did not do so, but waived their right to object upon all technical grounds. They objected later upon no ground which might not be waived by them.

> "But the rule (Section 723 of the Revised Statutes) was devised and the statute was enacted mainly to secure to the defendant the privilege of a trial by jury, and this he may waive. If in a suit in equity he answers and submits to the jurisdiction of the court, he cannot thereafter object that plaintiff has a plain, adequate and complete remedy at law, provided that the subject matter of the suit is of a class over which a Court of Chancery has jurisdiction and it is competent for the Court to grant the relief sought."
>
> Cobban v. Conklin, 208 Fed. 231 (234).

All waivable grounds of objection were open to defendants at the time of answering originally, whether such objections appeared upon the face of the bill or

did not appear upon the face of the bill, but existed within the knowledge of defendants.

"The object of a demurrer or plea, as a general rule, is to excuse the defendant from answering the bill on its merits. Both are dilatory pleadings,—a demurrer being proper if the fault of the complainant's case is apparent from the face of the bill, and a plea being proper if the fault must be shown by bringing matter dehors upon the record. Accordingly it has been generally said in the books that a party cannot demur or plead and answer the same matter, but he may demur to one part of the bill, plead to another, and answer to another. If he answers to the same part that he demurs to, his answer will overrule his demurrer. The rule is the same at law. 1 Chit. Pl. 512. The answer for the rule is thus given by Gilbert (Forum Rom. 58), in speaking of dilatory defenses:

" 'All these pleas with us are to be put in *ante litem contestam,* because they are pleas only why you should not answer; * * * so that, if you answer, your plea is waived.' This rule is laid down everywhere as expressive of the true function of a demurrer or plea in its relation to the answer. Mitf. Eq. Pl. (Tyler's Ed.) 304, 305, 411; Beames, Pl. Eq. 37; Whaley v. Dawson, 2 Schoules & L. 371; Jones v. Earl of Strafford, 3 P. Wms. 81; Oliver v. Piatt, 3 How. 412; Clark v. Phelps, 6 Johns. Ch. 214; Wade v. Pulsifer, 54 Vt. 71. * * *

"In this case it is urged that a court of equity has no jurisdiction as a court of law could give the orator an adequate remedy. This objection, if valid, is apparent upon the face of the bill, and so is the subject of a demurrer, and, if it be sustained, the case is at an end. But an objection to the jurisdiction of the court, if the court has general jurisdiction of the subject-matter, will not be entertained unless it is brought to a hearing before the expense of a trial upon the merits has been incurred. In 1 Daniell, Ch. Pr. 579, it is said that if the objection

> to the jurisdiction is not taken seasonably by plea or demurrer, and the defendant enters into his defense at large, the court having the general jurisdiction will exercise it. To the same effect are the cases: Society v. Trustees, 23 Pick. 148; Underhill v. Van Cortlandt, 2 Johns. Ch. 369; Bank v. Railroad Co., 28 Vt. 470. Indeed, the rule in equity appears to be the same as at law. A plea to the jurisdiction at law is said to be analogous to a plea in abatement, and is the earliest in the order of pleading; and, if the general issue be pleaded, the jurisdiction is confessed. So in equity it is a dilatory objection that is waived by an answer."
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> Holt v. Daniels, 17 Atl. 786-787.

The defendants should have filed a new or supplemental answer to the original bill, and not having done so appellants were entitled under Rule 32 to an order for a decree pro confesso as to the whole bill.

> "Although it is the practice to call a bill thus altered (by amendments) an 'amended bill,' the amendment is in fact esteemed but as a continuation of the original bill, and as forming part of it, for both the original bill and amended bill constitute but one record; so much so that, when an original bill is fully answered and amendments are afterwards made to which defendant does not answer, the whole record may be taken pro confesso generally. 1 Daniell, Ch. Prac. & Pl. (3rd Am. Ed., by Perkins) 403; French v. Hay, 22 Wall., at page 246."
>
> Excelsior Pebble Phosphate Co. v. Brown, 74 Fed. 323.

The orders having been properly entered should not have been set aside by the lower court but should have been allowed to stand and a final decree entered under Equity Rule 17. No application was made, on the

ground of inadvertence or mistake, for relief from the orders for decrees, but defendants stood flatly upon the legal ground that they were not in default. The record presented and now presents no ground for the interference with the orderly progression of the suit in equity under the new equity rules. No relief which the law does not entitle appellees to has ever been sought by them as touching the orders for decrees pro confesso.

Parties should be held to a compliance with the rules, for they have all the force of positive statutes; they control and must be respected to the point of compliance with them, otherwise it would be as was said of the very question in Green v. Elbert, 134 U. S. 615; 34 L. ed. 792:

> " * * * our regulations might become more honored in the breach than the observance, and the recognition of due procedure would be seriously weakened and impaired."

In Story's Equity Pleading, Section 454, it is said that,

> "The want of due form constitutes a just objection to the proceeding in every court of justice, for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked that infinite mischief has been produced by the facility of courts of justice in overlooking errors of form. It encourages carelessness and places ignorance too much on a footing with knowledge amongst those who practice the drawing of pleadings."

Moreover, the appellees have no claim upon equity to assist them: The defendants (appellees) requested and received extensions of time in the early stage of the the suits in consideration of an agreement to answer (Tr. pp. 75, 76); in certain of the suits they received other extensions upon their written statement that they would not move to dismiss (Tr. pp. 81, 82); they received yet other extensions upon their written agreement not to oppose going to trial as soon as the cases could be reached for trial (Tr. pp. 75, 83, 84); in an affidavit of Wm. H. Devlin, one of the attorneys for appellees (Tr. p. 75), said Wm. H. Devlin is shown to have sent a telegram, dated July 31, 1914, to Burrell G. White, attorney for appellants, containing the following:

> "Have decided to answer in all cases in Federal Court. As this will take time I wish you would extend time to answer in all cases to and including the fifteenth of September. Will consent to cases going on next trial calendar if desired by you, or to be tried at next April term at Sacramento."

and in said affidavit it appears that said White replied by telegram the same day as follows (Tr. p. 76):

> "Your telegram of July 31st received. Your request is granted. If we are to wait so long however I think you should send me a rough synopsis of your defense so that the time of preparation may not be lost to me; also that depositions may possibly not have to be taken."

In an affidavit of said Burrell G. White (Tr. p. 81) it appears that Messrs. Devlin & Devlin, attorneys of record for appellees, wrote to said White as follows:

"Dear Sir:

As we do not intend to file a motion to dismiss the actions above referred to, the papers in which were served on September 4th, 1914, we shall be obliged if you will sign the enclosed stipulations, extending time of answer to and including October 20, 1914.

Very truly yours,

(Enc.) DEVLIN & DEVLIN."

That said White "signed the stipulations (Tr. p. 19) referred to in said letter and delivered the same to said Messrs. Devlin & Devlin"; that said Devlin & Devlin wrote to said White again as follows (Tr. p. 82):

"Dear Sir:

The motion to strike out parts of answer and motion for further and better particulars in the above-entitled action will be on the calendar in the United States District Court (2nd Division) on October 5th. Mr. William H. Devlin, who has charge of the matter, is at home ill and we should be obliged if you would consent to same being continued to October 26th.

Please advise, and oblige.

Very truly yours,

DEVLIN & DEVLIN."

and said White replied as follows (Tr. p. 83):

"Dear Sirs:—

Your letter of September 29th, 1914, has been received. I regret to learn of the illness of Mr. Devlin. Of course, under the circumstances, hearing of the motion will not be urged on October 5th, if Mr. Devlin is ill and cannot be present. It will therefore be understood that the matter will be continued to the next calling of the Calendar. The continuance will be with the further understanding that the motion will be heard at the next calling of the Calendar, and that no further continuance will be asked.

In connection with this matter, and the possibility of delay, I am reminded of an understanding, which I have with Mr. William H. Devlin, that when it comes to a trial the same may be set down for hearing at as early a date as may be agreeable to the court, and that no opposition to such a setting and time of trial by the defendants will be made.

If these matters be agreeable to you, please advise by return mail.

Very truly yours,

BURRELL G. WHITE."

to which last letter said Devlin & Devlin on October 1st, 1914, made the following reply (Tr. p. 84):

"Dear Sir:

Acknowledging receipt of yours of the 30th ult.: It is understood that the matter pending on October 5th, will be continued until the next calling of the calendar, at which time we shall be ready. So far as the trial of the case is concerned, there will be no effort, on our part to delay it. It is among the possibilities that Judge Van Fleet will prefer to try the case at Sacramento next April.

Very truly yours,

DEVLIN & DEVLIN."

The cases stood ready for trial for six months without objection being made to jurisdiction in equity; they were set for trial and complainants were permitted to go to within one week of date of trial before notice of any objection whatever. We submit the record as evidence of whether the subsequent conduct of appellees conformed to the letter or spirit of the promises and understanding between the parties made at a time when appellees were seeking the benefit of extensions of time which appellants willingly granted, as the record shows, in consideration of the promises given; also appellants

submit the record as to whether appellees are entitled to any assistance in equity.

Ownership of real property should not be difficult of determination. If a claimant has an interest in land, such interest is usually—all but necessarily—evidenced by some writing. Appellants offered in the lower court to set out in detail their claim of title, if appellees wished them to do so (Tr. p. 48, par. 1). They were not requested to set it out. Appellants, under Rule 20, called upon appellees by motion (Tr. p. 64) to state upon and under what instrument of title appellees claimed. An order that they do so was obtained in one of the suits from His Honor, Judge Dooling, presiding (Tr. p. 62), but was later set aside (Tr. p. 66). Appellees resisted, notwithstanding it must appear to this court that the setting out of the instrument forming the foundation of an alleged adverse claim of title to land would clearly be in the interest of the speedy administration of justice, perhaps determinative of the controversy and suit.

Philipps v. Philipps et al., 27 Weekly Rep. 436 Q. B. Div. (1879), was an action for the recovery of land wherein the plaintiff alleged title "by virtue of certain deeds, assurances, wills and documents," and wherein there was raised the question of how a statement of claim in such an action should be drawn. In the course of the opinion on appeal, the following language was used:

> "The object of the rules is that the plaintiff should state his case and be tied to it, and I am of opinion this statement of claim is bad.

> "What possible justification is there for the allegation in this statement that the plaintiff in the alternative is entitled to the lands under various Crown grants? Why is not the Crown grant to be stated? What difficulty is there in the way of stating it? This pleading is in reality a fishing statement of claim, and the appeal must be allowed."

It will be observed that the objectional pleading in the foregoing case was entered by the plaintiff. The authorities cited in this brief show the sufficiency of the bills of complaint in the pending suits, being brought under state statutes and as construed by state decisions and affirmed by United States Supreme Court decisions. The complainants, however, made their offer to set out whatever details of title defendants might demand. The motion of complainants for a statement of further and better particulars of the claim of defendants to title was directed to the alleged equitable defense set up in the answer of defendants. The following English case shows with what particularity a defendant is required to set up his claim of title where such claim is based upon any equitable ground; the English rule does not differ in any material respect from American practice in general as to the particularity required in the pleading of equitable claims and defenses, whether by the plaintiff or defendant. The following English case refers to Philipps v. Philipps et al., supra, and states that the rule, made applicable to plaintiffs in the Philipps case, is likewise applicable to a defendant relying upon an equitable claim. The other English case referred to above is Sutcliffe v. James (July, 1879), 27 Weekly Rep. 752, in which it is said:

"In this case it appears to me that the plaintiffs have succeeded. The title begins with a lease of the premises in Bridge street, Cardiff, in 1829:— (His lordship then stated the facts of the case, and came to the conclusion that the contents of the deeds, of which the drafts had been tendered in evidence and objected to, had been sufficiently proved, and continued:—) If this were all, I should give judgment for the plaintiffs. But in this case the defendant has insisted, in the first place, upon a legal title; he has put the plaintiffs to the strictest proof of these deeds; he has made no disclosure, and then, not content with this, he has further set up an equitable title. He says that he claims this property through the persons entitled in reversion to Mrs. Price. * * * He does not choose to say what the assurances were by which Mrs. Miles' interest vested in him. In my opinion, this pleading is insufficient. I read ord. 19, r. 15, which says that 'no defendant, in an action for the recovery of land, who is in possession by himself or his tenant, need plead his title, unless his defense depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defense that he is so in possession.' That, in my judgment, leaves a defendant depending for his defense upon an equitable estate in exactly the same position as any other person who depends upon such an estate. Then I turn to ord. 19, r. 4, and that says that 'every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies.' In a case, then, of the present kind the defendant must state the various facts on which he relies; and what are those facts? Clearly the 'divers mesne acts and assurances' by which Eliza Miles' interest was transferred to the defendant. These the defendant has not stated; he has only stated the results which follow from

them, which is not in accordance with the rule. In coming to this conclusion, I am strongly fortified by the case of Philipps v. Philipps. In that case, it is true, the question turned on an allegation of the plaintiff's; but in my view a defendant who relies upon an equitable title is in the same position as a plaintiff. This being so, ought the defendant to have leave to amend? In my opinion, he ought not to have leave to amend. The defendant has resisted the production of documents and he has never stated the effect of the documents in his possession. To use the homely old phrase, he was 'entitled to sit upon his deeds', and he declined to allow even the short effect of those deeds to be known. This being the course which he has hitherto pursued, I think it would be unjust in the present stage of the proceedings to allow him now to adopt a different course, and there must be judgment for the plaintiffs as prayed."

The course of appellees in the pending suits constitutes a record of inordinate resistance and obstruction to the ordinary progress of a suit in equity.

The record shows a disposition on the part of defendants to avoid trial upon the merits, to delay such trial, and if possible to defeat a trial through a technical position on their part. If complainants own the property involved, justice demands a speedy determination and equity does not look with complacence upon efforts to delay or defeat its ends.

"Inasmuch as the so-called demurrer was fatally defective in lacking affidavit of defendant and certificate of counsel required by Rule 31 there was no error in disregarding it and entering a decree pro confesso. * * * While in this motion and petition there are stated many matters in which de-

> fendants claim there was error on account of which the decree should be set aside and the defendant given leave to plead, and while there is a general allegation that it has a full, perfect, and meritorious defense to the demand set up in the bill yet * * * the case has presented an effort on the part of defendant to avoid or delay the payment of a just debt.
>
> "Of course, it need not be said that under such circumstances a court of equity will not strain a point to assist defendant."
>
> Sheffield Furnace Co. v. Withrow, 149 U. S. 574; 37 L. ed. 853, 855.

In law the defendants clearly became and remain in default and in neither law nor equity are they entitled to relief therefrom.

THE TRIAL COURT HAVING ERRED IN SETTING ASIDE AND VACATING THE ORDERS FOR DECREES PRO CONFESSO, ITS ORDERS SHOULD BE REVERSED, AND THIS COURT SHOULD MAKE FINAL DECREES IN FAVOR OF APPELLANTS, DISPOSING OF THE SUITS.

The appellate court has a right to do what the court below should have done, that is, to make final decrees pro confesso as of the term at which they should have been made and entered.

> Richmond v. Atwood, 52 Fed. 23 (collecting authorities);
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> Potter v. Beal, 50 Fed. 864;
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> Baker v. Warner, 132 U. S. 568; 58 L. ed. 384, 9;
>
> Scott v. Sanford, 19 How. 393; 15 L. ed. 710;
>
> Harrison v. Clarke, 182 Fed. 765.

In Richmond v. Atwood, supra, the Court said (page 23):

> "Unquestionably the circuit court upon the hearing therein might have found the facts against the complainant and dismissed the bill, and the question presented is whether this court, having an appeal before it involving the same record and the same facts, may, if error is found upon the general question of right, proceed to do what the court below should have done; or shall this court, although it has examined the record, and determined the right under the patent the other way, simply dissolve the injunction, permit the accounting to go on, and after the useless expense and annoyance incident to such an investigation, upon re-examination of the same record, by the same court, put in execution the right which it had necessarily determined in the appeal theretofore considered? * * * a rule which would permit such circuity and circumlocution is unnecessary, and would not be useful to either the parties or the court."

And again at page 28:

> "Under the authorities and the equity practice to which we have referred, and upon principle, it seems to us clear that, while the appellate court is not bound by an inflexible rule so to do, it may in its discretion, and should, when equity so requires, make full direction as to the manner in which the cause shall be disposed of below."

In Scott v. Sanford, supra, the Supreme Court of the United States, speaking through Mr. Chief Justice Taney, said (15 L. ed., p. 710):

> "The correction of one error in the Court below does not deprive the appellate court of the power of examining further into the record, and correcting any material errors which may have been committed by the inferior court. There is certainly

no rule of law—nor any practice—nor any decision of a court—which even questions this power in the appellate tribunal. On the contrary, it is the daily practice of this court, and of all appellate courts where they reverse the judgment of an inferior court for error, to correct by opinions whatever errors may appear on the record material to the case; and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy * * *. And this has been uniformly done by this court, when the questions are in any degree connected with the controversy, and the silence of the court might create doubts which would lead to further and useless litigation."

In Harrison v. Clarke, supra, the rule is concisely stated as follows:

"It is well-settled practice in the federal courts of appeal in reviewing equity causes to dispose of them finally on the record before the appellate court and not remand them for further trial in the Circuit Court. * * * the advisability of putting an end to litigation with all convenient speed requires us to closely adhere to the practice so well established."

In Potter v. Beal, supra, it is said:

"We have no doubt that when this court properly takes jurisdiction on appeal from a final decree it has power to go beyond a mere reversal, and to enter such decree as should have been entered by the court below on the whole case as appearing in the record; nor have we any doubt that it is likewise its duty to review all the interlocutory proceedings of every character, using the term in the largest sense, with reference to which objections have been seasonably made and insisted on."

But for the action of the lower court in having erroneously vacated and set aside the orders for the decrees pro confesso, appellants would have, at the expiration of thirty days from the date of said order, had final decrees pro confesso entered, as was their right under the equity rules, and, therefore, if this court finds that appellees were in default it should either make and enter decrees, or in event it shall not do so, it should direct the entry of final decrees as of the term of entry of the orders for decrees pro confesso. Otherwise, appellees will assert a right to make application to the trial court to set aside the decrees under Equity Rule 17, and to come in at that time, however distant and long delayed, and do what they should have done many months ago. Should such application be made and allowed by the lower court, it would be the duty of the appellate court to set aside such orders on a second appeal, for the time at which such application could have been made has passed and the appellees are not now entitled to seek commiseration and the mercy of the court. In the interests of substantial justice, courts often relieve litigants from the effect of the error of their ways, if application be seasonably made, but it has always been held, in both the federal and State courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, and where the facts are within the knowledge of both parties, does not constitute a basis for relief at law or in equity. In other words, mere mistake or ignorance of the law, standing alone, does not constitute an excuse or defense against its enforce-

ment. It would be impossible to administer the law if ignorance of its provisions were a defense thereto.

8 Encyc. U. S. Rep. 423, 4, and long list of cases cited;

10 Ruling Case Law 304;

Utermehle v. Norment, 197 U. S. 40, 55; 49 L. ed. 655, 661, 2;

Upton v. Tribilcock, 91 U. S. 45, 50; 23 L. ed. 203;

Snell v. Atlantic F. & M. Ins. Co., 98 U. S. 85; 25 L. ed. 52;

U. S. Bank v. Daniel, 12 Pet. 32; 9 L. ed. 989, 998;

Hunt v. Rousmaniere, 1 Pet. 1; 7 L. ed. 27, 33;

Mantle v. Casey, 31 Mont. 408; 78 Pac. 593;

Brooks v. Johnson, 122 Cal. 572;

Shearman v. Jorgensen, 106 Cal. 483;

Note to R. R. Co. v. Jones, 55 Am. St. Rep. 498;

Boggs v. Fowler, 16 Cal. 559; 76 Am. Dec. 561;

Hawralty v. Warren, 18 N. J. Eq. 124; 90 Am. Dec. 613;

Yancey v. Downer, 5 Litt. (Ky.) 8; 15 Am. Dec. 35;

Dickerson v. Ripley Co., 6 Ind. 128; 63 Am. Dec. 373;

Piano Mfg. Co. v. Murphy, 16 S. D. 380; 92 N. W. 1072; 102 Am. St. Rep. 692.

The rule is thus stated in 8 Encyc. U. S. Rep. at page 423:

"It has been held from the earliest days, in both the federal and state courts, that a mistake of law,

pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitues no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake'' (citing long list of cases).

And at page 424:

''But relief is granted in cases of mistake of law in exceptional cases. But there must be some element, other than a mere mistake of law, which will afford an excuse.''

Again, at page 426:

''Mistake or accident, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person' * * *''

And yet again, page 427:

''There must be diligence in discovering the mistake and asserting right to relief.''

And even where consideration is sometimes shown, and relief extended, in some few exceptional cases of mistake of law, the circumstances of the particular case must be extreme and attended with some condition such as would warrant the belief that undue advantage was taken; such, for instance, as a marked disparity in the position and intelligence of the parties, with the result that on the one side undue influence is exercised, while on the other undue confidence is reposed. Hence, in addition to the mistake of law, there must be circumstances which tend to show misrepresentation, surprise, undue influence, misplaced or undue confidence,

unfair or deceptive conduct, or something partaking of the nature of fraud or imposition. Assuredly, nothing of the nature of either of the foregoing is attributable to the parties herein. It is manifest that this is not a case attended with such circumstances as would warrant relief from a pure and simple mistake of law. Furthermore, "there must be diligence in discovering the mistake and asserting right to relief."

In a note to 55 Am. St. Rep. (at page 498) the rule is said to be:

> "The result of the authorities is, that ignorance or mistake of law alone, and hence of one's rights, does not, as a rule, excuse, and that it is no ground for either defensive or affirmative relief in equity, and such ignorance or mistake includes misconception of the law, erroneous deductions, and misapprehension of legal rights" (citing cases).

And again at page 500:

> "Equity will not relieve against a pure mistake of law, if there is no fraud, imposition, misrepresentation, undue influence, imbecility of mind, misplaced confidence, or other special circumstances of a similar character * * *".

In the recent case of Utermehle v. Norment, supra, the Supreme Court of the United States said:

> "We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defense, but there must be some element, other

than a mere mistake of law, which will afford an excuse. In addition, there ought to be no negligence in attempting to discover the facts. * * * It has been held from the earliest days, in both the Federal and state courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitues no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake. * * *

"Exceptional cases where relief has been given have been, as stated, where there was fraud or imposition upon the individual by the person seeking to avail himself of the contract of the other party."

Mantle v. Casey, supra, was a case wherein counsel for defendant filed a motion to quash the summons, believing that such motion would prevent the entry of a default, and that if the decision were against the motion the court would permit defendant to answer. In commenting upon this feature the Court said:

"It is immaterial whether such practice had been recognized or followed, or whether rules in that regard had been adopted. Courts cannot establish rules or recognize a practice which is contrary to that prescribed by the statute. Defendants' attorneys were charged with knowledge of the practice provided by this statute. Their failure to appear or answer was not caused by surprise, inadvertence, or excusable neglect, but by a misunderstanding of the law. '*Ignorantia legis neminem excusat.*' A mistake in the law is not such excusable neglect, inadvertence, or surprise as will be sufficient to set aside a default. Chase v. Swain, 9 Cal. 130."

In Shearman v. Jorgensen, 106 Cal. 483, the Court said:

"Defendants' counsel asks to have the judgment set aside, as appears by the foregoing recitals taken

from the affidavits, upon the grounds: 1. That he did not consider the notice of the overruling of the demurrer a legal notice at the time it was received, and, in effect, admits that he has since ascertained that he was mistaken as to the law; 2. He drafted an answer (long after his time to answer had expired) which he thought had been served and filed, but, through inadvertency upon his part, it had not been done. The causes for the inadvertency are not stated in the attorney's affidavit. Stripped of unimportant matters, these are the material facts disclosed by his affidavit, and we think they disclose a case barren of any merit, for mistake as to the law bearing upon the question of notice cannot be urged by him with any hope of success. Regardless of his lack of knowledge that plaintiff's attorney was a nonresident of the City and County of San Francisco, he admits that he received the notice through the post office December 9th, and this in law amounted to a personal service (Heinlen v. Heilbron, 94 Cal. 636). Under these circumstances the attorney's plea of ignorance of the law as to the validity of the notice would be paralleled by a plea that he did not know that an answer to plaintiff's complaint was required to be served and filed."

The same rule is followed in Brooks v. Johnson, 122 Cal. 572, in the following language:

"Upon a motion for a new trial, the attorney for the appellant read an affidavit to the effect that he received the notice of the motion to set the cause for trial, but supposed that he would receive a notice for the time for which it would be set; that he did not receive such notice, nor have any knowledge that the case had been set for trial, until after the trial had been had and judgment entered. * * *

"An attorney is presumed to know the rules of the court in which he appears, and his want of

such knowledge does not authorize the relief from a judgment taken against him upon the ground of surprise. The failure of the attorney to give any attention to the notice that on the 2d of November an application would be made to have the cause set for trial cannot give him any greater right than he would have had if he had been present on that day; nor was the plaintiff required to give him any notice of the day that had been set by the court for the trial of the cause."

Nor does the fact that an inferior court made an erroneous decision upon a question of law and that a party litigant was misled thereby and suffered a loss constitute ground for relief in equity.

10 R. C. L. 314, Sec. 57;

Jacobs v. Morange, 47 N. Y. 57;

Doll v. Earle, 65 Barb. 301;

Dickerson v. Ripley County, 6 Ind. 128; 63 Am. Dec. 373;

Kenyon v. Welty, 20 Cal. 637; 81 Am. Dec. 137.

Jacobs v. Morange, supra, was a case in which defendant obtained judgment against plaintiff in the Marine Court of the City of New York. Plaintiff carried it for review to the Court of Common Pleas of that city, where judgment was reversed. Subsequently, the Court of Appeals decided that the Common Pleas had no jurisdiction. Defendant issued execution upon his judgment in the Marine Court. Plaintiff, thereupon, instituted this action in equity and obtained judgment granting a perpetual stay of defendant's proceedings, on the ground that the judgment in the Marine Court was erroneous, and that the parties had acted under

a mutual mistake of law in the review in the Common Pleas. The order granting the injunction was reversed, the Supreme Court saying:

> "The whole basis for this relief is founded upon the fact, that an inferior court made an erroneous decision upon a question of law. This is the best position the plaintiff can take. This must be the 'surprise' sometimes spoken of in the books.
>
> "What a flood of litigation would such a rule open? If this can be regarded as the 'surprise' that requires or justifies equitable relief, how broad is the principle, how etxensive its ramifications? Almost every case reviewed by this court would form a basis for such 'surprise'; especially where courts of last resort review or modify their own decisions. How many cases are lost in the trial or upon review by the ignorance of counsel in failing to perceive the point, or in failing to present it properly for review. How easy to get up cases, in the ordinary affairs of life, of a misunderstanding of the law * * *. Under such a system it would be difficult to reach the end of a lawsuit. * * *
>
> "Suppose a plaintiff had misunderstood the statute as to the time to appeal, could a court of equity extend the time prescribed by statute? Many such cases have occurred, from a misapprehension of the law as to when a judgment is perfected. Courts of law could grant no relief, and I am not aware that any lawyer has supposed that a court of equity had any more power to extend the statute."

Mistake of an attorney as to the law is not ground for relief in equity, as it cannot be based upon surprise, inadvertence, or excusable neglect, but is a misunderstanding of the law, and is not a sufficient excuse, for not

pleading in time, to authorize the setting aside of a default julgment.

10 R. C. L. 314;

Mantle v. Casey, 31 Mont. 408; 28 Pac. 593;

Brooks v. Johnson, 122 Cal. 572;

Sherman v. Jorgensen, 106 Cal. 484;

Allen v. Continental Ins. Co., 97 Ill. App. 164;

Phifer v. Travellers Ins. Co., 123 N. C. 405; 31 S E. 715;

Bardonski v. Bardonski, 144 Ill. 284; 33 N. E. 39.

For

> "if our errors are in themselves grounds for interposition in favor of our clients, surely they shall not be without cause of redress, and the worst of us shall have precedence over the best,"

to quote the language of the digester in note to 31 Am. St. Rep. 250.

An attorney is bound to know the rules of the court and ignorance or mistake on his part is not a good excuse for neglect to take the proper proceeding within the time allowed by law and the rules of court. Reasonable compliance with the rules prescribed is expected and will be insisted upon.

Green v. Elbert, 137 U. S. 615, 621; 34 L. ed. 792;

Richardson v. Green, 130 U. S. 104, 112; 32 L. ed. 872.

Where a motion, which has been filed out of time, or without authority under the rules or statute, is pending, the time for doing that which the law required to

be done is not extended or held open by such motion and default is properly entered.

Highley v. Pollock, 21 Nev. 198; 27 Pac. 895;
Shinn v. Cummins, 65 Cal. 98; 3 Pac. 133;
McDonald v. Swett, 76 Cal. 258; 18 Pac. 324;
Phillips v. Kerr, 26 Ill. 213;
Mantle v. Casey, 31 Mont. 408; 78 Pac. 593.

And where the motion is of such a character that plaintiff is justified in treating it as a nullity, default is properly entered and will not be set aside.

Sheffield Furnace Co. v. Witherow, 149 U. S. 574; 37 L. ed. 853;
Dudley v. White, 44 Fla. 264; 31 So. 830;
Stapp v. Thomason, 2 Litt. (Ky.) 214;
Insurance Co. v. Porter, 44 Fla. 568; 33 So. 473;
Daniell v. Sanderson, 22 Pa. St. 443.

In Sheffield Furnace Co. v. Witherow, supra, the Supreme Court held that a final decree pro confesso was properly entered, disregarding a demurrer on file which lacked the certificate of counsel and affidavit required by the rules.

Putting aside the question of mistake or inadvertence, which it is manifest appellees could not hope to urge with any degree of success, especially since their attention was repeatedly directed to the principle involved in Equity Rule 32, their election to totally disregard the rules and stand unqualifiedly upon their purported right to be heard upon a motion to dismiss prohibits them from now being heard to say that their failure to file an answer to the amended bills of complaint as required by the rules was due to inadvertence.

Suppose a defendant interposed a demurrer to a bill, and, after an order overruling same, he refused to answer and suffered a judgment to be entered against him. Upon a judgment of affirmance in the appellate court, could defendant then be heard upon a motion to file an answer to the merits? Not any more than appellants could successfully move to file an amended bill after their refusal to amend upon permission being given by the trial court and the order sustaining the dismissal had been affirmed by this court.

In either case, the party made his election and it is elementary that he would be compelled to abide it, just as appellees should be required to abide their election to stand on their asserted right to file a technical objection instead of answering in compliance with the rules of court and of practice.

Aurora City v. West, 7 Wall. 82, 99; 19 L. ed. 42;
Bank v. Buckner, 20 How. 108; 15 L. ed. 862;
People v. Jackson, 24 Cal. 633;
Sutter v. San Francisco, 36 Cal. 116;
Penhallow v. Doane, 1 L. ed. 507, 527.

In People v. Jackson, supra, the Court said:

> "We are asked to modify our judgment so as to grant the relator leave to amend his complaint. However much we might be disposed to grant the petition in this respect, we are precluded from doing so by the course which counsel saw fit to pursue in the court below. We can only review the action of the court below, and if that be found right, the only judgment which we can render is one of affirmance. The relator had leave to amend his complaint in the court below, but declined to do so—electing to stake his fortune upon the complaint as

> it then stood. Had he asked leave to amend, and had leave to amend been refused, there would have been action on the part of the court which we could review. As it is, there has been no action in the court below adverse to the relator's right to amend, and it follows that no action can be had upon the question in this court."

It follows, therefore, that, since there are no legal or equitable grounds upon which appellees would be entitled to relief from a decree pro confesso, the court should on this appeal, inasmuch as its silence might create doubts or misconstruction which would lead to further and useless litigation, render such decision as will preclude the possibility of the court below entertaining a motion for relief in the nature of an application to have the decrees set aside and permission given appellees to answer. Such a course will avert vexatious delay and unnecessary expense which would be incident thereto, assuming that this court would order a reversal of such orders by the lower court, if made. In short, all phases of the situation which are possible of determination at this time, the full record being before the court, should be disposed of by the court's present order and the litigation finally terminated.

Appellees stood upon their claimed right to file motions to dismiss the suits. They took the benefit of the delay pending the hearing of said motions; they were successful in the lower court and have taken the benefit of the delay gained by them through their motion to dismiss.

It is a general principle that where a party takes the benefit of any mistake and the other party suffers

loss therefrom, the benefited party may not later seek to correct the mistake to his further advantage.

> "It may be laid down as a general principle that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. * * * If it were a mistake * * * it was one made by the defendant of which he took the benefit, and the plaintiff the loss, and it is too late to correct it."
>
> Davis v. Wakelee, 156 U. S. 680, 689; 39 L. ed. 578, 584.

In the pending suits the record shows no ground whatever for a departure by this court from the recognized policy of appellate courts, particularly in equity, "to dispose of suits finally on the record before the appellate court and not remand them" (Harrison v. Clark, 182 Fed. 765 (supra).

In Baker v. Warner, 231 U. S. 588, 593; 58 L. ed. 38, 49, it is said:

> "We are not limited, however, to a consideration of the point presented by the plaintiff, this being a writ of error from an intermediate Appellate tribunal, but must enter the judgment which should have been entered by the court below on the record then before it."

We submit the record herein as entitling the appellants to whatever decrees the court below should have entered on the record then before it and petition this court to make its decrees herein final as of the time the court below should have made decrees in favor of appellants.

THE NEXT AND LAST QUESTION TO BE CONSIDERED IS WHETHER THIS COURT HAS JURISDICTION TO MAKE DECREES IN ALL SIXTEEN SUITS, CONSOLIDATED BY ORDER OF THE COURT BELOW "FOR THE PURPOSES OF APPEAL", PRIOR TO THE DECREE OF DISMISSAL (Tr. p. 43).

The suits consolidated with suit No. 88, Ennis-Brown Company, a corporation, v. Central Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are suits No. 89, J. C. Wickler v. Same; No. 90, L. E. Bontz v. Same; No. 91, Katarina Haub and John Haub v. Same; No. 92, George K. Rider v. Same; No 93, Millen Realty Company, a corporation, v. Same; No. 94, Charles Colquhoun v. Same; No. 95, Cordelia Elkus v. Same; No. 101, Mary Helen Curtis v. Same; No. 102, Adams Realty Company, a corporation, v. Same; No. 103, Mebius and Drescher Company, a corporation, v. Same; No. 126, P. C. Drescher v. Same; No. 127, Heenan Investment Company, a corporation, v. Same; No. 128, F. B. Adams v. Same; No. 129 A. S. Hopkins Company, a corporation, v. Same; No. 130, John Breuner Company, a corporation, v. Same.

The order of consolidation, in this instance, specified that it was for purposes of an appeal. Section 921, Rev. St. U. S., provides that:

> "When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The effect of an order of consolidation, as extending throughout the life of causes, including their course through appellate courts, has been recognized by both Circuit Courts of Appeals and by the United States Supreme Court in many instances and under widely varying circumstances. The purpose of the statute is said to be "to avoid unnecessary costs or delay in the administration of justice."

In United States v. Baltimore & O. S. W. R. Co., 159 Fed. 33, under suit Nos. 1776, 1771, the Circuit Court of Appeals (Sixth Circuit) says:

> "The two causes above entitled were heard together in this court, being alike in all essential particulars. They were 2 of 12 similar causes in which suits were brought by the United States to recover penalties for several violations by the defendant railroad company of an act of Congress entitled 'An act to prevent cruelty to animals while in transit by railroad or other means of transportation' from one state to another. * * *
>
> "The causes were properly consolidated. Section 921 of the Revised Statutes (U. S. Comp. St. 1901, p. 685) provides that 'when causes of a like nature or relative to the same question are pending before a court of the United States,' this may be done. Whether one judgment may be given for all or a separate judgment in each case will depend upon the special circumstances. If it is necessary to the due administration of the law and the protection of the rights of the parties that the integrity of the several causes shall be so far preserved as to secure the proper result in each case, to the end that the party aggrieved may not be embarrassed thereby in seeking relief against the judgment or for any other sufficient reason, the court will direct the proceedings accordingly. The statute is one for convenience in saving expense to the parties and the time of the court."

An appeal was taken in the foregoing suit or suits to the United States Supreme Court, reported in 220 U. S. 94; 55 L. ed. 385. In the statement by Mr. Justice Lamar preceding the opinion, there appears the following:

> "The court sustained the company's motion to consolidate the causes, entered judgment for a single penalty, and ordered 'that the within order in case 1866 shall apply to, operate upon, and be conclusive of, all the rights of the plaintiff in each of the several causes, to wit, 1867-1874, 1880 and 1884.' The government sued out a writ of error in case 1866, and, apparently out of abundant caution, another in 1867, later entering into a stipulation in the circuit court of appeals that the result in these two cases should control all the others.
>
> "The circuit court of appeals for the sixth circuit (86 C. C. A. 223, 159 Fed. 33) held that the order of consolidation was proper but reversed the judgment on the ground that the United States were entitled to recover eleven penalties, or one for each of the eleven shipments."

Again in the opinion it is said (page 389):

> "The court, we think properly consolidated all the cases (Rev. Stat., Sec. 921, U. S. Comp. Stat. 1901, p. 685), and, as consolidated, the amount of the possible penalties sued for in the eleven actions was fifty-five hundred dollars. The company is liable for nine penalties, because nine times it failed to unload as required by the statute. One penalty should be imposed as to animals referred to in cases numbered 1871 and 1872, and one as to those in 1869 and 1873, where the time for the required unloading respectively coincided. In other respects the judgment of the Circuit Court of Appeals, reversing the judgment of the District Court is affirmed."

It will be observed that in the foregoing case there was an order of consolidation of twelve cases made in the court of first instance. Two writs of error were sued out, one in case No. 1866 and another in case No. 1867, the latter being "apparently out of abundant caution"; that later, a stipulation was entered into in the Circuit Court of Appeals to the effect that the result in the two cases should control all the others. There is no suggestion of doubt on the part of either appellate court in the foregoing case as to jurisdiction over all the cases under the circumstances there present.

In Headrick v. Larson, 152 Fed. 93 (96), Judges Gilbert, Ross, and Morrow sitting, it is said:

> "The stipulation for the consolidation of all these proceedings and for the submission to this court of the questions involved therein is filed in this court. There was no stipulation in the court below, nor were the causes there consolidated. The jurisdiction of this court is confined to the review of error committed in the court below in the cause which is brought before us upon appeal. It does not extend to errors committed in other causes. The counsel who appear for the appellees in this court were not the counsel who signed the stipulation, and they now object to the jurisdiction of this court to review any question which is not directly involved in this appeal. This they have the right to do."

In Louisville & N. R. Co. v. Summers, 125 Fed. 719, it is said:

> "At the hearing of this cause our attention was attracted to the circumstance that, although it was proposed to review two separate judgments, only one writ of errror was sued out and one assignment of errors filed. Technically this was irregular, as the consolidation of the causes in the court below

> was only for convenience in trying them. The verdict and judgments were separate, as they should have been, and had no dependence upon one another, and no relation, except that they rested upon a similar, and to some extent a common, record. But the defendant in error makes no objection on that account, and we conclude we may waive the irregularity, as was done by the Supreme Court in similar circumstances in Brown v. Spofford, 95 U. S. 474, 24 L. ed. 508."

In Brown v. Spofford, cited in the foregoing case, it is said:

> "Nothing remains for remark but to advert very briefly to certain irregularities which appear in the proceedings. Judgment rendered in the first suit before the parties went to trial in the second, and yet defendants were allowed to file eight bills of exceptions which purport to be applicable to each of the two cases; and the judgment in each case is removed here by one writ of error, though the transcript does not show that the two cases were ever consolidated. Such proceedings are palpably irregular, but, inasmuch as they are not the subject of objection by either party, the court has decided to exercise jurisdiction and dispose of the controversy."

Hence we find that jurisdiction has been exercised over many cases under a single writ of error where there has existed neither order of consolidation nor stipulation. Indeed, appellate courts are inclined to review and dispose of all cases on appeal which have been considered together in a court below. We know of no case where an appellate court has refused to recognize the force of an order of consolidation on appeal; this is true, notwithstanding the records examined have been of suits wherein the appeals have been taken

up as individual cases on separate records, upon a single record containing the several cases, or upon a single record of one or more of the cases consolidated. Appellate courts have ignored the method pursued. The purpose of the statute is to minimize delay, expense and labor, and appellate courts have not been captious as to the method pursued in accomplishing the purpose of the statute. As tending to show the favor with which orders of consolidation are looked upon by appellate courts, we quote from Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285; 36 L. ed. 706:

> "Where the English consolidation rule has not been adopted, the American courts, state and Federal, have exercised the authority of ordering several actions by one plaintiff against different defendants to be tried together, whenever the defense is the same, and unnecessary delay and expense will be thereby avoided. (Citing cases.) The learning and research of counsel have produced no instance in this country, in which such an order, made in the exercise of the discretionary power of the court, unrestricted by statute, has been set aside on bill of exceptions or writ of error."

It is said in R. C. L., Vol. 1, page 361:

> "But under a statute authorizing the consolidating of actions it has been held that the consolidation merges all the actions into one suit. There may be many causes of actions but the effect of consolidation is to join them all in one suit."

and in Castro v. Whitlock, 15 Tex. 437, it is said:

> "When two suits are consolidated they constitute thereafter but one suit."

We submit that the authorities above cited show that this court has jurisdiction to make decrees in all suits,

and appellants respectfully petition this court that it exercise its jurisdiction in that regard, and make therein final decrees granting to appellants the relief prayed for in their several amended bills of complaint and disposing of said suits, reversing the decrees of dismissal of the lower court, and correcting the several orders of the lower court herein complained of, the making of which appellants have assigned as error.

Dated, San Francisco,
March 15, 1916.

Respectfully submitted,

BURRELL G. WHITE,
Attorney and Solicitor
for Appellants and Complainants.

EDWARD ELLIOTT,
ROY S. BARTLETT,
Of Counsel.

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No. 2729.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ENNIS-BROWN COMPANY,
a Corporation,
Appellant and Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY,
a Corporation, and SOUTHERN PACIFIC
COMPANY, a Corporation,
Appellees and Defendants.

Points and Authorities of Appellees and Defendants.

E. J. FOULDS,
WM. H. DEVLIN AND
DEVLIN & DEVLIN,
Attorneys and Solicitors for Appellees and Defendants.

Filed this *day of* *1916.*

FRANK D. MONCKTON, Clerk.

By *Deputy Clerk.*

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POINTS AND AUTHORITIES OF APPELLEES AND DEFENDANTS.

STATEMENT OF THE CASE.

The transcript involves but one appeal, to-wit: from the decree of the District Court dismissing the suit upon the motion of the appellees and defendants after the refusal of the appellant and the complainant to amend its complaint. There are, in fact, fifteen similar suits, but no appeal has been taken from the similar decree in each of said cases, although there is an attempt, on the part of the appellant, to have this Court consider the same by reason of a purported order of consolidation in the District Court (Trans. pp. 42.43).

The original complaint was an action to quiet title and, undoubtedly, sufficient in form under the law of the State of California. In the original complaint there was no averment as to whether or not the complainant was or was not in possession, or whether the defendant Southern Pacific Company was or was not in possession, the only allegation in regard to possession being contained in paragraph VII of the original complaint (Trans. p. 3), which stated that the defendant Central Pacific Railway Company was not in possession. The defendants answered the original complaint, and did not seek to have the title of the complainant quieted, but merely alleged possession and set up some equitable defenses.

The original bill of complaint was superseded by an amended bill, which was substantially the same as the original bill, except that paragraph VIII was added (Trans. p. 16), which set forth that the defendant Southern Pacific Company was and is a public service corporation, and as such corporation was in possession of and using all the land described in the complaint. An amendment was made to the amended bill, in which it set forth that the defendants Southern Pacific Company and Central Pacific Railway Company are, and each of them is, engaged in the general business of railroad corporations as common carriers of passengers and freight, and that the Southern Pacific Company maintains upon and over a portion of the property, not describing it however, a railroad main track, over which it operates trains. That on other portions of said property the said com-

pany maintains other railroad tracks, which are switching tracks, and a large structure known as the Sacramento freight sheds, and sheds used as a wharf bordering upon the Sacramento River. It is then averred that the public interest did not require the maintenance of the continuance of the said last mentioned tracks or sheds, but that all of the same were used exclusively by the said defendant Southern Pacific Company, and that the said company claims that, as a public service corporation, it is entitled to the continuous and exclusive use of said tracks, sheds and the land upon which the same are situated. The amendment then sets forth certain allegations bearing upon the location of the land, namely: that it is situated near the foot of certain streets in the City of Sacramento and borders upon the Sacramento River, and that the land described in the complaint, together with land adjacent thereto not described, is the most convenient point for the shipment of freight into and from the City of Sacramento, and that the public interest of the citizens of the City of Sacramento and of the County of Sacramento require that said property should not be used exclusively by said defendant Southern Pacific Company, and that the use of said property by said company is subordinate to the requirement of the public interest.

A motion to dismiss the suit, after the filing of the amended bill, was made (Trans. pp. 22-24), and the amendment to the amended bill was made at date of hearing of said motion, to-wit: June 21st, 1915. At the same time a motion to transfer the action to the

law side of the court was made by the defendants (Trans. pp. 66-68), and also a motion for a better statement and for further and better particulars (Trans. pp. 68-70), and, likewise, a supplemental motion for further and better particulars as to paragraph IX added to the amended bill was made and noticed for July 12th, 1915 (Trans. pp. 71-74).

On July 1st, 1915, a stipulation was entered into between counsel that the defendants' motion to transfer the cause to the law side of the court, also for further and better particulars and also to dismiss said cause shall be taken and deemed to be made with reference to and applied to the amended complaint, as amended June 21st, 1915, which is the amendment to the amended bill adding paragraph IX, and an order of Court was made in conformity therewith. (See stipulation and order (Trans. p. 70). This stipulation was, in effect, a consent of the complainant that the motion to dismiss, as well as the other motions, should be made and heard by the Court, and at no time does the transcript show any objection on the part of the complainant to the procedure which was followed, or to the presentation and decision of the motion to dismiss, until the opinion of the District Court, adverse to it, was rendered. It is apparent, therefore, that the only matter to be considered upon this appeal is the allegations of the amended bill and the amendment thereto, above referred to, and the motion to dismiss the suit.

The opinion of Honorable William C. Van Fleet, Judge of the court, is set forth in full in the transcript

(Trans. p. 25 *et seq.*), from which it appears that the motion to dismiss was presented to the Court, without objection on the part of the complainant, it, at that time, being willing that the sufficiency of the amended complaint should be determined by the Court (Trans. pp. 25 to 39). The District Court allowed the complainant ten days after the date of the order dismissing, to-wit: December 1st, 1915, in which to amend its complaint, if so advised, and of which order notice was duly given, and the said complainant having declined to amend its said amended bill within said time, or at all, a decree was filed and entered December 22d, 1915, dismissing the action. (Trans. pp. 44-45.)

Notwithstanding, the complainant, without objection, participated in the argument of the motion to dismiss, and notwithstanding the order of the Court made on December 1st, 1915, dismissing the action (Trans. p. 40), and notwithstanding that the complainant was in default in not amending its complaint within the ten days allowed, it, on December 15th, 1915, applied to the clerk of the court for an order taking the amended bill and the amendment to the amended bill, *pro confesso* (Trans. pp. 40-41,) but upon motion of defendants, the Court, on December 20th, 1915, vacated and set aside the order so made, holding that it was inadvertently and inadvisedly made.

Appellant's brief was received on March 18th, 1916, by counsel, who has prepared this brief. As the appellees' brief must be served and filed by March

25th, 1916, the cause being set for hearing for March 28th, 1916, it will be impossible for counsel to fully answer all of the points contained in appellant's brief, consisting of one hundred and fifty pages, and to analyze all of the authorities cited therein, at least one hundred and fifty in number, within the time allowed by the rule of court. Hence, counsel for appellees will submit the points and authorities bearing upon the question so far as time will enable them to prepare the same, and at the oral hearing will ask the Court for appropriate time in which to file an additional brief, fully answering and analyzing the points and authorities of the appellant.

The opinion of Honorable William C. Van Fleet, Judge of the District Court, upon the question of dismissing the suit is set forth in the transcript (Trans. p. 25 *et seq.*), and the same, without being repeated here, is adopted as a part of appellees' argument and brief.

STATEMENT OF POINTS OF LAW DISCUSSED.

I. The complaint stated no cause of equitable cognizance, because it appeared that complainant was out of possession and a defendant was in possession and occupation of the premises. The legal remedy is adequate.

II. Procedure, including the rules of pleading, is governed by Federal practice, and not by state practice, even where rights given by state laws are being enforced in Federal Courts.

III. The complaint stated facts showing no cause of action in favor of complainant at law or in equity.

IV. Defendants were not in default, and hence it was error to take the bill *pro confesso,* and was proper to vacate the decree *pro confesso.*

V. The suit was properly dismissed and not transferred, for the reason that a transfer would have been futile.

VI. There was no joinder in appeal to equitable jurisdiction, and hence no waiver of objection to jurisdiction.

VII. The order for consolidation was improper and ineffectual for any purpose.

POINT I. DEFICIENCY OF THE COMPLAINT IN EQUITY.

The element of possession.

The amended complaint states that complainant is the owner in fee of the property, and that the defendants claim some interest adverse, but without right. It is not averred that the plaintiff is in possession. It is averred that the defendant Central Pacific Railway Company is not in possession, but that the defendant Southern Pacific Company is in possession, and that it is a public service corporation and using the land as such public service corporation. Equity has no jurisdiction in an action to quiet title, unless the complainant is in possession, or the land is unoccupied.

Whitehead v. Shattuck, 138 U. S. 146;
Southern Pacific Co. v. Goodrich, 57 Fed. 879.

The case of *Whitehead v. Shattuck,* 138 U. S. 146, was approved in *Northern Pac. R. Co. v. Amacker,* 49 Fed. 537, 7 U. S. App. 33, disallowing suit to quiet title where plaintiff is not in possession; *Gordon v. Jackson,* 72 Fed. 88, 89, *Gombert v. Lyon,* 80 Fed. 305, *Erskine v. Forest Oil Co.,* 80 Fed. 586, *Blythe v. Hinckley,* 84 Fed. 256, *Davidson v. Calkins,* 92 Fed. 232, 234, 236, and *Hughes v. Hannah,* 39 Fla. 373, 22 So. 615, all disallowing suit in equity where defendants are in possession; *Spokane Mill Co. v. Post,* 50 Fed. 431, 432, refusing to enjoin nuisance on facts; *Southern Pac. R. Co. v. Goodrich,* 57 Fed. 880, 881, bill to quiet title must allege that plaintiff is in possion, or that both are out of possession; *Sanders v. Devereux,* 60 Fed. 314, 315, 19 U. S. App. 630, bill for partition must show seisin or possession of plaintiff; *Frey v. Willoughby,* 63 Fed. 866, 27 U. S. App. 417, tenant in common out of possession cannot maintain bill for partition.

Holland v. Challen, 110 U. S. 15, which is fully analyzed in *Whitehead v. Shattuck,* 138 U. S. 146, is not authority for the principle that in equity a complainant out of possession can sue a defendant out of possession in an action to quiet title where the land is occupied by some other person. Note the discussion in *Whitehead v. Shattuck,* 138 U. S., p. 155, where it refers to the land involved in *Holland v. Challen* as being unoccupied by any person. The true

owners must obtain possession through ejectment on the law side from the occupant and after he has obtained possession, if there is a cloud upon his title commence a suit in equity to remove the same, but if the land is unoccupied, it would be impossible for him to bring an action in ejectment, and, hence, under the doctrine of *Holland v. Challen, supra,* he can bring his suit in equity without first obtaining possession. *Holland v. Challen* may have been construed by some Courts as authorizing a suit in equity in the nature of an action to quiet title to be maintained by a complainant out of possession against a defendant out of possession, but a careful analysis of the facts of the case, as well as the discussion of it in *Whitehead v. Shattuck, supra,* shows that the principle was announced only as to land that had no occupant at all. The complaint in the present case, therefore, in order to state a cause of action against the defendant, Central Pacific Railway Company, should have alleged that the land in question was unoccupied, but, on the contrary, it is averred that it was occupied by the Southern Pacific Company and devoted to public purposes.

The case of *Southern Pacific Railroad Co. v. Goodrich,* 57 Fed. 879, was approved in *Davidson v. Calkins*, Circuit Court, S. D. California, 92 Fed. 231-239, and also in the case of *United States Mining Company v. Lawson,* Circuit Court, D. Utah, 115 Fed. 1005-1008.

Complainant will not be permitted to maintain a suit to quiet title on the equity side of the Federal

Court when it does not allege possession in itself, but, on the contrary, alleges possession in one of the defendants, and that another defendant is out of possession, for if this is so, an action to quiet title could be maintained on the equity side of the Federal Court by complainant out of possession against a defendant in possession, and the plaintiff could confer jurisdiction of ejectment on a chancellor by the mere expedient of joining one or more defendants out of possession. Complainant should recover possession, if it is the legal owner of the property, on the law side of the court, and then after it recovers possession, if it establishes such legal ownership, it is put in a position to maintain a suit on the equity side against the defendant out of possession.

The motion to dismiss, on the part of the defendants, was made jointly and severally. As to the Southern Pacific Company, the defendant in possession, complainant, upon the face of its amended bill, ousted the court of jurisdiction. As to the Central Pacific Railway Company, out of possession, there is no case holding that a suit to quiet title on the equity side can be maintained against such defendant, unless the land is wild, uncultivated and unoccupied, and in this case the bill on its face negatives any such assumption, as it is averred that the land is in the possession of the Southern Pacific Company and all devoted to railroad purposes for the public use. There are no allegations in the complaint which show when the Southern Pacific Company took possession of the property in question, or when it devoted the same

to public use. For all that appears in the complaint, it may have been in possession through itself and its predecessors in interest in such railroad use for a period of time which will presume a grant from the predecessors in interest of plaintiff.

When the amended bill and the amendment to the bill was filed the fact that the Federal Court on the equity side had no jurisdiction was, in fact, conceded, and it was claimed that jurisdiction on the equity side could be conferred by alleging that all of the property in question was not necessary to the railroad use in the discharge of its duties as a common carrier of passengers and freight. A railroad company can condemn, not only for main line tracks, but also for switching tracks, sheds, depots and wharves.

If it is claimed that the Southern Pacific Company is in possession of some portions of the property described in the complaint, which it could not have condemned, then complainant, by describing such portions in an action in ejectment, could maintain its action upon the law side, and probably could do so in the statutory form of an action to quiet title, and if the complainant did not know, or could not ascertain what these portions were, it could have attacked the entire holding of the defendant Southern Pacific Company and so compelled the Southern Pacific Company to eliminate at the trial the portions of the property which it would have the right to hold. We do not concede this to be the correct view, but, according to appellant's theory, it should have done so, if it cannot so draft its pleading as to require the

Court to determine, as a legal question, what property is necessary to the railroad use, especially when it alleges that it is all used for general railroad purposes in the discharge of the public duty, which the railroad company owes.

The right to condemn in eminent domain is attributable to legal jurisdiction, and the necessity for such condemnation is always a question to be determined in a condemnation proceeding. If, however, the railroad company acquires private property by grant, or enters upon private property and devotes it to public use, the question of whether the property is a necessary use is foreclosed, as it is clear that a railroad company has the right to condemn not only for the present use, but also for future uses, when they can be reasonably anticipated. If the Southern Pacific Company, or its predecessors in interest, have taken the property of the complainant without grant from it, or its predecessors, or without judgment in condemnation, then it is clear that the Southern Pacific Company, or its predecessors owe to the owners of the land at the time of the taking the market value of the land so taken, what is commonly known as "damages" for the taking, and these damages are ascertainable in a suit at law, and under the present Constitution of California (Constitution of 1879, Art. I, Section 14), the question of damages must be ascertained by a jury. If the taking has been without grant, or without such judgment in condemnation, the only recourse that the owner has is to sue for the value at the time of the taking, and this right belongs

to the owner at the time of the taking. It is, therefore, apparent that when the complainant alleged that all of the property was devoted to the public use, then equity had no jurisdiction to determine what was necessary, or what was not necessary, as this would permit the court then to become an administrative body to determine what property the railroad company should use and what it should not use. Complainant had ample opportunity to amend its complaint, so as to set up the claim for damages, but when it conceded the possession of all the property in the Southern Pacific Company and its devotion to public purposes, it could not further claim that an action to quiet title would be maintained, as the only remedy in such a case is one for damages, based upon the value of the property at the time of the alleged taking.

Complainant states that the decisions which hold that an action to quiet title on the Federal side cannot be maintained, unless it is alleged in the complaint that the complainant is in possession, or that the land is unoccupied, is based upon section 723 of the Revised Statutes, now Judicial Code, sec. 267, which provides that equity will not maintain a suit where there is a plain, speedy and adequate remedy, while the authorities cited in this brief show that in the absence of such statute, equity would refuse to entertain jurisdiction where there is a plain, speedy and adequate remedy at law. Complainant does not show in its bill that it has not a plain, speedy and adequate remedy at law.

The contention of appellant that there are cases when a bill will be retained by a Federal Court to quiet title, regardless who is in possession, is unsound because inaccurate. (Appellant's Brief, p. 45.)

The cases cited by complainant to support this proposition, as far as we have examined them, are distinguishable in that every one of them showed some independent and distinct ground of equitable relief on which the bill might have been retained without reference to the object of quieting the title. For instance, the case of *Woods v. Woods*, 184 Fed. 159, sought a partition and accounting, and, incidentally, the quieting of title. The cases of *Gormley v. Clark*, 134 U. S. 338; 33 L. Ed. 909, and *Sharon v. Tucker*, 144 U. S. 545; 36 L. Ed. 536, were both suits which sought to restore or establish of record the evidences of complainant's title, and, incidentally, to quiet his title. An examination of all of the cases cited by complainant, and many others, will show that a bill to quiet title has been retained in one of the two classes only. First: where the quieting of the title is the principal object of the suit, unmixed with other grounds of equitable relief; and, Second: where an independent ground of equitable relief is pleaded and the quieting of title is incidental or supplemental to that. Complainant has cited no case in which a bill solely for the quieting of title has been retained against a defendant in possession. The Federal Courts have recognized the distinction here made against complainant's cases, with respect to the jurisdictional fact of possession, in the following cases:

Klenk v. Byrne, 143 Fed. 1008; *American Association v. Williams,* 166 Fed. 17; *Peck v. Ayers & Lord Tie Company,* 116 Fed. 273; *U. S. Mining Company v. Lawson,* 115 Fed. 1005; *Cosmos Exploration Company v. Gray Eagle Oil Company,* 112 Fed. 4. All these cases discussed the sufficiency of an independent equitable right to sustain a bill for the quieting of title, which, because plaintiff had not the requisite possession, was not otherwise sustained.

All the cases cited both by complainant and by defendant, will be found to harmonize if this distinction be observed.

As complainant has alleged in its bill no independent or distinct equity, and as it also alleges defendant in possession, the bill is not sustainable in equity under the rule of *Whitehead v. Shattuck,* cited by defendant.

If *More v. Steinbach,* 127 U. S., p. 70, is authority for the principle that an action to quiet title can be maintained by the plaintiff out of possession against the defendant in possession, then it is overruled by the later case of *Whitehead v. Shattuck, supra.* It would seem, however, that the lands in *More v. Steinbach* were unoccupied.

See also *Boston & M. Consol. C. & S. Min. Co. v. Montana Ore Purchasing Co.,* 188 U. S. 632, 47 L. Ed. 626, approving *Whitehead v. Shattuck, supra,* stating: "The contention that under the Code of Montana a person not in possession may maintain an action to quiet title cannot prevail in the Federal Court."

Appellant's citations, at pages 47-73, inclusive, are designed to show that ejectment will not lie to take property out of possession of a defendant which is devoting it to public uses for which condemnation proceedings might lie; also to show that equity will grant injunction against such appropriation without just compensation. Both foregoing propositions are true, but it does not at all follow that an accomplished appropriation can be undone by a suit to quiet title. The denial of remedy by ejectment rests on the superior public interest and right; hence, it is not necessarily true that there must be an equitable remedy because there is none at law. There is none on either side of the court to recover the land, because there is no right to recover it from the public use.

The principles announced in *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387 (cited in appellant's Brief, p. 48), have no application here. An appeal was taken from a decree in a bill or information, filed by the State of Illinois against the Illinois Central Railroad Company, the City of Chicago and the United States, and a cross-bill therein filed by the city against the railroad company, the United States and the state. The object of the litigation was to determine the rights, respectively, of the state, of the city and of the company in land submerged or reclaimed in front of the water line of the city on Lake Michigan.

In the case at bar, the complainant has no connection with the State of California, or the City of Sac-

ramento. It does not appear how, where or when the title of the defendants was obtained. It presents a case of a controversy between a public service corporation on one side and individual defendants claiming to own the property. Even if a grant from the State of California, or the City of Sacramento should be involved in the controversy, although none, as yet, appears, it does not follow that a private claimant to the property could claim any benefit under the Lake Michigan decision in spport of his claim of title. If the State of California, or the City of Sacramento, originally owned the property in question and had granted it to the defendants, or their predecessors in interest, and such grant was ultravires, the State, or the city, if the Lake Michigan case applies, might make of the claim to the recovery of the property.

The Elevated Railroad cases cited by appellant, at page 59 of its brief, to show that equity takes jurisdiction in cases of this kind to determine rights of the adverse claimants are not in any sense authority for such a doctrine. Mr. Lewis' Eminent Domain [3 Ed.], sec. 892, points out that they are in substance suits to ascertain compensation and to adjudge that future operation be restrained if the compensation be not paid. The principle object is compensation, and the injunction is an alternative. How such a precedent will help appellant is not pointed out by its brief.

The bill cannot be sustained by regarding the possession alleged to be in Southern Pacific Company as immaterial.

Plaintiffs, in joining the several defendants, must be taken to have asserted a liability "against all of" them (New Equity Rules No. 26), since they have pleaded no facts showing grounds for uniting distinct causes of action to promote convenient administration of justice. (Id.)

If the asserted liability be "against all of them," then a defense open to the bill in favor of one of them (Southern Pacific Company) will defeat the bill as an entirety, no separate cause of action being set out with reason for uniting it.

It is clear and practically conceded (plaintiff's Brief, p. 36) by this argument that possession of Southern Pacific Company as against plaintiffs would be fatal to the bill if that corporation were the only defendant. The bill framed on a theory that the liability is against both cannot be made good by treating one of defendants as an immaterial one at plaintiff's suggestion.

Legal or equitable nature or cause of action. The cause finally pleaded was purely legal.

It is incorrect to say of a suit brought under California Code of Civil Procedure, sec. 738, that it is a "suit in equity *per se*." (Appellant's Brief, p. 12.) Whether the essential quality of such a suit will be equitable cannot be told under the practice in Cali-

fornia in a suit brought under that section until the issues are finally made up; and when by such a proceeding the defendant discloses his claim of title it may result in tendering purely legal issues to be joined and tried. This is explained in *People v. Center,* 66 Cal. 551, at p. 562.

To the same effect is *Hyde v. Redding,* 74 Cal. 493.

The effect of California Code Civ. Proc., sec. 738, is not only to enlarge the equitable rights of one claiming title against another who disputes it, but also to provide a remedy by which the State courts may administer such rights so enlarged. It is true that a Federal Court of equity will enforce by its equitable procedure such enlarged equitable rights as a State statute may confer; but it is equally true and quite important to remember that they will do so according to their own procedure and pleading.

When the bill was finally amended the facts stated sufficed to make out nothing but a defectively pleaded cause of action for damages. At an earlier stage it pleaded in effect a cause of action for recovery of possession from defendants. Both these are purely legal.

The averment that Southern Pacific Company is in possession of the premises, devoting them to public use and railroad purposes, necessarily shows that the only cause of action is one for damages; and for that the legal remedy is adequate.

On such facts the right of the public to have the land used for its benefit is paramount. The private right, if there was one, has been appropriated to the

public, leaving nothing to the owner but a right to the compensation allowed by the Constitution.

> *Gordon v. Cadwalader,* 51 Cal. Dec., p. 328 (March 8, 1916).
> *Gurnsey v. Northern California Power Co.,* 160 Cal. 699.

Accordingly there could be no title remaining in either of the plaintiffs, or in Central Pacific Railway Company, unless the latter was entitled by virtue of the public appropriation and use, and if plaintiff could have no title and defendant none except such as was paramount, then the bill is bad on its face.

As said in *California Gas & Oil Co. v Miller,* 96 Fed. 20, at p. 24, "the acts charged are such as necessarily imply that defendants are in possession." Here the application of the property to railroad uses as alleged necessarily implies that only a right of compensation remains. There is nothing left which can be tried on such a bill as this.

The action for damages is adequate, because on the face of the bill it appears that all of the property is devoted to public use. Therefore, all private titles are extinguished by the appropriation, and nothing remains except a right in the owner, who was such at the time of taking, to sue for his just compensation.

The only remedy against the defendant Southern Pacific Company, in possession as a public service corporation, is for damages for the value of the property at the time that the Southern Pacific Company

took possession, assuming that no proceeding in eminent domain has been heretofore had, and no grant was made to that defendant.

Gordon v. Cadwalader, 51 Cal. Dec., p. 328 (March 8, 1916).
Gurnsey v. Northern Pacific R. R. Co., 158 699;
Roberts v. Northern Pacific R. R. Co., 158 U. S. 10;
Wood on Railroads, Vol. 2, p. 994;
Elliott on Railroads (2nd Ed.), Sec. 1000;
Ency. of U. S. Sup. Court Reports, Vol. 5, p. 778.

Such an action for damages against the Southern Pacific Company for the value of the property is an action at law, and not in equity.

Kohl v. United States, 91 U. S. 367-376.

POINT II. THE FEDERAL AND NOT THE STATE PRACTICE AND PLEADING GOVERNS.

Enlarged rights derived from state statutes will be enforced in Federal Courts only according to the procedural distinctions between law and equity which existed in 1789 when the Judiciary Act was passed. (See appellant's Brief, p. 12.) It is provided in that act (Judicial Code, sec. 267), that:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

See 4 Fed. Stat. Anno., p. 530 and notes; also 1912 supplement to same, Vol. 1, p. 243.

By virtue of this statute a Federal Court cannot take jurisdiction of a suit *quia timet* on its law side merely because a state statute has provided that a so-called ejectment action may be had against one out of possession.

McConihay v. Wright, 121 U. S. 201, 205.

Conversely no suit will be entertained in equity, by name to quiet title, which in essence is an action of ejectment brought by one out of possession against one in possession to recover that possession on a trial of title.

Whitehead v. Shattuck, 138 U. S. 151.

In other words, the distinction between law and equity prescribed in Federal Courts by the Federal Constitution and the Judicial Code will not yield to allow a statutory right to be tried by some procedure laid down in the State statute. The Federal Courts may enforce the right, but they will not follow the variant procedure enacted by the State Legislature.

Sufficiency of the bill to satisfy the state statute is not the test in Federal Courts.

Appellant's contention, printed in black letter on p. 29 of their brief, is not correct in law. It is obnoxious to the well settled rule of Federal practice maintaining the distinction between law and equity

procedure and to all the distinctively Federal procedure. Moreover, the cases cited by appellant do not support it. Thus:

Harding v. Guice, 80 Fed. 162 (cited appellant's Brief, p. 30), was a suit to quiet title to *wild land* in actual possession of neither party; and it was therefore within the established rules.

Gillis v. Downey, 85 Fed. 483 (cited appellant's Brief, p. 29) merely holds that an allegation of *possession by plaintiff* of mineral locations will sustain an equitable suit to quiet title against an answer denying validity of the patents later acquired to such lands alleged to have been non-mineral. This case also is in complete harmony with Federal rules and opposed to the principle to which it is cited.

California Gas & Oil Co. v. Miller, 96 Fed 10, 20 (cited appellant's Brief, p. 31), did not hold what is ascribed to it. It involved exceptions to a bill which alleged a mineral location and *possession in complainant* thereunder, also that defendants pretented to a forfeiture and a relocation. It was held that this sufficed without anticipating the particular claims of defendants to state a case under California Code Civ. Proc, sec. 738, but that it *pleaded possession in defendants* for which reason the bill could not be maintained. Appellant failed to quote the material portion of this opinion found in 96 Fed. 23-25.

Wehrman v. Conklin, 155 U. S. 314 (cited appellant's Brief, p. 32), was a bill to stay an action of ejectment, and to quiet title in *complainant*, who alleged himself to be *in possession*, and also that his title was good,

but that there was a defect therein which defendant was estopped to urge and which estoppel could not be as well made in the ejectment suit. This was held to make out a case in equity. The rule that parties will be relegated to common law remedies if adequate was reaffirmed on authority of *Holland v. Challen; Whitehead v. Shattuck;* and other cases. Appellant did not quote the material portion of this opinion. It follows the portion which it did quote. See 155 U. S., p. 325, at bottom.

Holland v. Challen, 110 U. S. 15 (cited appellant's Brief, p. 31), involved land not occupied by either party, or at all, and in such case it was held that the suit would lie in the Federal Court under the enlarged right given by the state statute.

The foregoing are all the authorities cited to support the black letter proposition (Appellant's Brief, p. 29), that the Federal Courts will take jurisdiction if the facts alleged suffice to come under the state statute. None of them do support it, and from other parts of this brief it will appear that no sound authority could be found to support it. The substantive facts entitling one under a state statute must always be so pleaded as to make a case consistent with the practice in law or equity in that side of the court to which plaintiff resorts.

See

McConihay v. Wright, 121 U. S. 201, 205;
Whitehead v. Shattuck, 138 U. S. 151.

POINT III. THE COMPLAINT STATED NO CAUSE OF ACTION IN LAW OR EQUITY.

Title of complainant.

Complainant alleges that the interests of the public require that the property be not used exclusively by defendants (Trans. p. 18); and, this being equivalent to alleging that it is impressed with a public use, complainant cannot recover without proof that it has title for and behalf of the public to such use, and that it is superior to the public use which by the allegations appears to be in defendants. No such allegation appears. Hence, the bill is bad in any aspect, legal or equitable.

There can be no cause of action but one for damages; and complaint does not show itself entitled to that.

Sufficiency of the amended bill under California Code of Civ. Proc., section 738, 379, 380. (Appellant's Brief, p. 24.)

Bearing in mind the rule already adverted to (Point II) that the state procedure is not imported into a Federal Court administering rights derived from state statutes, it is not material whether the complaint would have been good under the state practice; because the rules of pleading and the forms of actions are part of the procedural law of the state, and in California distinctions therein are abolished by the Codes.

Nevertheless, it may be said that the complaint is bad under the California Code of Civil Procedure, because it shows that no cause of action to recover possession or title could lie on behalf of any one. There could be no action but one for damages for the taking of land and applying it to a public use without condemnation, as held in a recent decision of the California Supreme Court (March 8, 1916) in *Gordon v. Cadwalader,* 51 Cal. Dec., p. 328.

The California rule as to real property in possession of a public service corporation and used by it in discharging its duties to the public, which is the allegation here. (Par. IX, amended complaint. Trans. p. 17), will control the rights as between complainant and defendant Southern Pacific Company, and only such cause of action as is cognizable in the state court can be the basis of action in the Federal Court. The California authorities will not permit ejectment or an injunction or any interference with the possession, but will allow damages to the owner of the land at the time of the taking, to be ascertained in the same way as if the public service company was condemning in the first instance, and a present claimant to land cannot claim such damages unless he has a special assignment of the cause of action from the owner at the time of the taking.

Gurnsey v. Northern Cal. Power Co. 160 Cal. 699, 712.

Complainant should have amended his complaint, and set up damages and ownership at the time of taking.

See also

Fresno, Etc. Co. v. Southern Pacific Co., 135 Cal. 202;
Southern Cal. Ry. Co. v. Slauson, 138 Cal. 344;
Crescent Canal Co. v. Montgomery, 143 Cal. 252;
Gordon v. Cadwalader, Vol. 51, Cal. Dec., p. 328, decided by Cal. Supreme Court March 8, 1916.

Propriety and necessity of taking the particular land is not now subject to judicial question.

When possession has been taken and the property applied to right-of-way, sheds for freight, or any other proper and incidental railroad uses, no further question of necessity of the appropriation or the public nature of the use made remains for the courts.

It is said in *15 Cyc.*, 634, 635, that:

> "Under a power conferred by the legislature the selection by the condemning company of land required for the construction of a railroad, or the location of its depot and other buildings, or the location of its route between certain fixed termini, cannot be controlled by the courts, if such selection is made in good faith, and is not capricious or wantonly injurious, or in some respect beyond the privilege conferred by the charter or statute."

Mr. Lewis says (*Lewis Eminent Domain*, 3rd Ed., Sec. 815), that:

> "In general the condemnor is allowed a large discretion in determining the quantity necessary and the exercise of this discretion will not be interfered with except in case of abuse."

California Code Civ. Proc., Sec. 1238, permits appropriation by railroads for all of the uses, such as wharves, freight sheds and switch tracks mentioned in the complaint.

It thus appears that there is an application of the land to public uses, which the courts cannot question, at least in a suit such as this.

POINT IV. THERE WAS NO DEFAULT AND DECREE *PRO CONFESSO* WAS ERRONEOUS.

It is not true that defendants were in default. (See appellant's Brief, p. 112.)

By terms of New Equity Rule 32 they had ten days to put in a *new* or *supplemental* answer after amendment of the bill. This was done by moving to dismiss. The motion to dismiss was a demurrer, and under New Rule 29 a demurrer may be made by answer. Such a motion is a "defense."

Wilson v. American Ice Co., 206 Fed. 736, 738.

Accordingly there was an answer standing as to each and every part of the bill when default was erroneously claimed by plaintiff's-appellants.

In *French, Trustee, v. Hay, et al.,* 22 Wall., p. 246, it is said that the general rule is that an amendment of a bill gives the defendant the right to answer as if he had not answered before, and, again, on the same page, "But the amendment is sometimes of such a character that it is regarded as independent graft upon the original case and the beginning of a new lis pendens. The case of *French, Trustee, v. Hay, supra,* was approved in *Blythe v. Hinckley,* 84 Fed., p. 228, wherein, on page 224, it is said:

> "But it is a general rule that any amendment of a bill, however trivial and unimportant, authorizes a defendant, after his appearance, to put in an answer making an entirely new defense, and contradicting his former answer, if one has been filed. 1 Daniell, Ch. Prac. (6th Am. Ed.) 409; 1 Frost. Fed. Prac. (2d Ed.) 280; French v. Hay, 22 Wall. 246: Nelson v. Eaton, 13 C. C. A. 523, 66 Fed. 376; Fisher v. Simon, 14 C. C. A. 443, 67 Fed. 387."

In the case at bar it is clear that the defendants had the right to put in a new answer, or adopt their former answer and file a supplemental answer as to the new matter set forth in the amendment, and, likewise, had the right to move to dismiss portions of the amended bill and the amendment to the amended bill, not included in the original bill, and also had the right to amend their answer to the original bill by raising the defense that no valid cause in equity is stated, even assuming that, under the rule, they did not have the right to move for a dismissal, based upon the amended bill and the amendment thereto,

but as the objection that the complaint did not state a valid cause of action could have been taken advantage of by answer to the original bill, if the points were available, the motion to dismiss raising that defense, can be deemed an amendment to the answer to the original bill, or by reason of the stipulation and order of court entertaining the motion to dismiss as to the amended bill. (See New Equity Rule No. 32.)

The order that the bill be taken pro confesso.

When the amended bill was filed it set up, for the first time, new matter, which was destructive of the alleged cause of action, and it was the duty of the defendants to call the attention of the Court to this by a notice of motion to dismiss for insufficiency, so as to avoid a trial upon the merits, as that would be unnecessary.

Rule 12 of the New Equity Rules requires the defendants, within the time therein allowed after the service of subpoena, to file their answer, or other defense.

Rule 16 requires the defendants, unless the time shall be enlarged, to file their answer, or other defense, to the bill within the time named in the subpoena, and in default thereof, the plaintiff may, at its election, take an order as of course that the bill be taken *pro confesso*. If, however, the answer, or other defense, has been filed, no such order *pro confesso* can be had. The notice of motion to dismiss

for insufficiency is a defense at least, and, hence, prevents the taking of an order *pro confesso.*

See

Wilson v. American Ice Co., 206 Fed. 736, 738.

Rule 30 sets forth what the answer shall contain. It requires the defendants to set out their defense to each claim. The objection of insufficiency of fact constitutes a valid defense in equity, which might heretofore, under the old rules, have been made by demurrer or plea, but now shall be made by motion to dismiss, or in the answer. Consequently, the motion to dismiss for insufficiency of fact constitutes a valid objection in equity and constitutes a defense based upon a matter of law corresponding to a demurrer to the bill under the former practice. If the defendants, however, move to dismiss the bill, or any part thereof, for such insufficiency, the motion may be set down for hearing, and, if it be denied, answer shall be filed within five days thereafter, or a decree *pro confesso* entered.

Rule 32 provides that where an amended bill shall be made after answer is filed, the defendants shall put in a new or supplemental answer within ten days after that in which the amendment or amended bill is filed, unless the time is enlarged, or it is otherwise ordered by the Judge of the court, and upon a default, proceedings may be had as upon omission to put in an answer.

Rule 32 must be construed in connection with all of the other rules, and particularly in connection with

Rule 29. As the defendants can move to dismiss the bill, or any part thereof, it is clear that they have the right to dismiss the amended bill, or any part thereof, for it will often occur that matters will be set up on the amended bill which will render the same insufficient, although the original bill may not be open to the attack of insufficiency. In other words, whenever any complaint, whether in original form, or by separate amendment, or in the form of an amended complaint, is before the Court and is subject to insufficiency of fact to constitute a valid cause of action in equity, it is the right of the defendants to move to dismiss the same before they are required to answer upon the merits.

Rule 32 recognizes that no default can be taken for failure to answer an amended bill, except upon an omission to put in an answer, and there is no omission to put in an answer if a motion to dismiss for insufficiency is filed, unless said motion has been denied and five days has elapsed.

The order of Court made on December 1st, 1915, was practically a dismissal of the action, and there can be no order that the bill be taken *pro confesso* after the action has been dismissed.

After the Court made an order dismissing the action, the only decree that could be entered was one dismissing the action, and the clerk had no power or authority to enter any other order, as there was nothing pending upon which any order could be predicat-

ed, except the order or decree of dismissal, in conformity with the order of the Court.

If the amended complaint which was filed is to be regarded as a new pleading, taking the place of the original complaint as a pleading, and this has been the view of the Court, as well as the understanding of all the parties, then it is subject to Rule 29, which gives the defendant the right to move to dismiss the bill, or any part thereof, based upon insufficiency of fact, to constitute a valid cause of action in equity, and this postpones the time to answer on the merits until five days after notice of the denial of such motion. If, on the other hand, the amended bill be not regarded as substitutionary of the original bill, but only an amendment to the bill as to the matter amended, then the defendants, under Rule 32, have the right to put in a new or supplemental answer thereto. This means that they have the right to rely upon their original answer to the original bill as to all issues which are contained in the amended bill, and may answer by a supplemental answer to their original answer as to all new matter set forth in the amended bill, or they have the right, if they so desire, to file a new answer to the amended bill as a whole. Consequently, under this view of the case, the original answer to the original bill standing in the case will prevent a decree or an order *pro confesso*, and, necessarily, as to the matter contained in the amended bill, which is not in the original bill, it is subject to Rule 29, which allows the defendants to move to dismiss a part of the bill, as well as the whole bill, and,

consequently, the motion to dismiss would apply to the amendments to the original bill, incorporated in the amended complaint, and no default could be had thereon until five days' notice after the denial of such motion. In addition thereto, it may be said that Rule 32 does not require an answer to be filed to an amended bill, if the time has been enlarged. The effect of Rule 29 is to enlarge the time to answer, if a notice of motion to dismiss for insufficiency is made, and, besides, the order of dismissal made by the Court before the application that the bill be taken *pro confesso* amounts to a compliance with the provisions of Rule 32, reading, "or it is otherwise ordered by the Judge of the court." In other words, the dismissal of the bill before the application that the bill be taken *pro confesso* amounts to an order that the defendants shall not answer, as there is nothing to answer. However, we are of opinion that an answer may be either upon its merits, or by setting up a matter of law, as the rules recognize that the objection as to the sufficiency of the bill may be taken either by motion, or in the answer; hence, the motion itself is an answer, and while it is pending, no default exists.

Again, Rule 16 provides that if the defendants do not file their answer, or other defense, within the time named in the subpoena, the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*. As the defendants, within the time, have filed their defense, namely: a claim and objection that the bill is insufficient to state a cause

of action in equity, it follows that the condition required by Rule 16 for an order that the bill be taken *pro confesso* has not been fulfilled, for the making of the defense prevents the default, as well as the filing of the answer.

The District Court had the right to vacate the order entered by the clerk (Rule 17), and did so (Trans. p. 42). No objection appears in the record on the part of the appellant to the order and no exception is noted.

Under Rule 29 of New Equity Rules, every point of law arising upon the face of the bill for insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole as a material part of the cause of action stated in the bill may be called up and disposed of before final hearing at the discretion of the Court. By the same rule, it is provided that if the defendant moved to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

It follows from Rule 29:

(a) An amended bill which is radically different from the original bill is subject to a motion to dismiss.

(b) If an amendment is added to the original bill

or to the amended bill the amendment so added is subject to such motion to dismiss, because it is a part of the bill, and a motion to dismiss as to the same cannot be made until the amendment is made.

The decree pro confesso was properly vacated and set aside. (See appellant's Brief, p. 128.)

First, because the opinion ordering dismissal was on file and the case was thus virtually terminated by it.

Second, because no default existed to which the rules of court for entering decree *pro confesso* could apply.

Third, because even had the Court ruled adversely on defendant's motion to dismiss, defendants would have been entitled to five days in which to answer thereafter. This is expressly provided in New Equity Rule 29, last sentence. Before such time and condition it was premature to take the bill as confessed even if the state of the pleadings had permitted, which, in this case, they did not.

POINT V. DISMISSAL OR TRANSFER OF CAUSE.

Appellant claims that the suit should have been transferred to the law side, if the bill was insufficient in equity. (Appellant's Brief, p. 111.)

The District Court would have done so but for one

obstacle (Trans. p. 39). The complaint did not state a cause of action at law. Complainant concedes this (Appellant's Brief, p. 112).

The District Court gave the complainant the right to amend its bill, but it refused (Trans. p. 45). Hence, it cannot complain that the cause was not transferred to the law side, or that it was dismissed. As the defendant Central Pacific Railway Company was alleged to be out of possession, no amendment could be made to state a cause of action on the law side. As the defendant Southern Pacific Company was alleged to be in possession of all of the property, devoting it to public purposes, this discharged equity jurisdiction, and hence the Court could have transferred the cause to the law side and then dismissed it because it did not state facts to constitute a cause of action, but instead gave the complainant the right to amend so as to cover the necessary facts to constitute a cause for damages, but complainant having refused to amend, then dismissed it (Trans. p. 45).

It would have been error to transfer the cause to the law side, for the reason that it did not "appear that [the] suit commenced in equity should have been brought as an action on the law side." New Equity Rule 22. (See appellant's Brief, p. 111.)

It will have been seen from previous argument that in any view of the amended bill it fails to state a cause of action at law or in equity. There was therefore no object in transferring it to the law side merely to have dismissal entered on that side. If plain-

tiffs have any cause of action it is one for damages which will require an entirely new complaint with further facts set out. New Rule 23 implies that the case need not invariably be sent over.

As to the dismissal without prejudice to an action at law.

Appellant never asked that the dismissal should be made without prejudice to an action at law. How then is it aggrieved?

It could have amended the complaint, as leave was granted to do so, but declined to amend, so as to state a good cause of action at law. If, however, the decree, as made, is not to be regarded as without prejudice to an action at law, this does not require a reversal, but only a modification of the decree directing the District Court to add to the decree "without prejudice to an action at law."

Appellant's contention, however, is without merit or substance. If appellant has a cause of action for damages, this judgment is no bar to such cause, when properly pleaded. All that is barred is the right to sue to quiet title, or for possession under the facts pleaded in this bill.

Not until the amended complaint was filed (June 4th, 1915), did the points urged by appellee for a dismissal of the action fully appear, and upon the filing of the same, appellee moved promptly to dismiss. No objection was urged to the right to so

dismiss, but appellant expressly stipulated that the motion to dismiss should be deemed to apply to the amended bill with the amendment of June 21, 1915, added (Trans fol. 111). Why did not appellant object to the motion to dismiss the amended bill at the time the motion was argued, instead of, in fact, stipulating that it should be taken and deemed to be made with reference to, and to apply to, the complaint, as amended June 21st, 1915, by the amendments filed on that date. What happened before the amended complaint was filed became immaterial for two reasons:

(a) The amended bill and amendment changed the original bill materially.

(b) The stipulation, as was made, was a consent to the making and hearing of the motion to dismiss the amended bill with the amendment of June 21, 1915, considered a part thereof.

POINT VI. OBJECTION TO JURISDICTION WAS NOT WAIVED.

It is not true that defendants have joined issue in equity.

The equitable defenses made in the answer are cognizable at law, and therefore do not elect to treat the complaint as one in equity. *There was no waiver.*

Moreover the amendment of the bill after answer entitled defendants to put in any new answer or

defense or any supplement to their original answer which was appropriate to the new matter added to the bill.

The foregoing propositions fully answer the contention of appellants at page 81 of their brief.

The rule that equitable estoppel is a legal as well as an equitable defense is laid down in

Dickerson v. Colgrove, 100 U. S. 578;
Kirk v. Hamilton, 102 U. S. 68.

With regard to the effect of amending the bill after answer the New Equity Rules No. 32 provides that defendant shall put in a "*new or supplemental* answer within ten days after that on which the amendment . . . is filed." This substantially the same as Old Rule 46.

The chancery practice generally was that after an amendment of a bill, however trivial and unimportant, defendant had a right to put in an answer making an entirely new defense; and he might plead, answer, or demur to the material matter of amendment the same as if it were an original bill; but one who had answered an original bill could not assign any cause of demurrer to which the original bill was open unless the amendment changed the nature of the case.

1 A. & E. Encyc. Pl. & Pr. 490, citing 1 Daniell Chan. Pr., 5th ed. 409 and numerous state decisions;
6 A. & E. Encyc. Pl. & Pr. 435, citing 1 Daniell Ch. Pr., 5th ed, 582.

If the new matter had the effect of destroying the equities of the bill, then necessarily it would, even after answer, be demurrable as a whole for want of equity. This applies where the nature of the case is changed by the amendments.

1 Daniell Chan. Pr., 5th ed., pp. 409, 583.

Nelson v. Eaton, 66 Fed. 376 at 378, quotes these as the rules. This was decided when Old Equity Rule 46 was in force, and New Equity Rule 32 is unchanged in substance; hence, this is the rule today having regard to the abolishment of technical distinctions between pleas, demurrers and answers.

By virtue of New Equity Rule 29 all defenses may now be made by answer *or* by motion to dismiss. Issues of law may be tendered by the answer as was held in *Boyd v. New York, Etc. R. Co.,* 220 Fed. 174 at 178. Accordingly the answer now includes the former functions of a demurrer. A motion to dismiss operates as a demurrer, and is a "defense."

Hyams v. Old Dominion, 203 Fed. 681;
Wilson v. American Ice Co., 206 Fed. 736;
Alexander v. Fidelity Trust Co., 215 Fed. 791;
Southwestern Surety Ins. Co. v. Wells, 217 Fed. 294;
Destructor Co. v. Atlanta, 219 Fed. 996.

Since the answer now also includes demurrer, the motion is an answer, because things equal to the same thing are equal to each other. The only difference as pointed out in *Alexander v. Fidelity Trust Co.,* 214 Fed. 495, 497, is that a motion to dismiss

may be set down for hearing on five days' notice by either party, while when law issues are made by answer they are heard on trial unless the Court sets them down for preliminary hearing.

POINT VII. THE ATTEMPTED CONSOLIDATION.

The trial court, on motion of complainant-appellant (Trans. p. 42), granted a consolidation of fifteen other cases with the one by which this appeal is entitled. This order was made on December 20, 1915. The opinion on motion to dismiss was filed December 1, 1915, and the order for dismissal was granted on December 1, 1915. The decree of dismissal was filed and entered on December 22, 1915 (Trans. pp. 39, 40, 42, 44).

The effect of a consolidation is to leave the causes of action distinct.

> *Mutual Life Ins. Co. v. Hillmon,* 145 U. S. 293.

Each record is that of an independent suit . . . and a decree in one is not a decree in the other unless so directed.

> *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.,* 95 Fed. 497, at 506.

The Federal statute allowing consolidation permits it "when causes of a like nature or relative to the same question are pending," etc. R. S. U. S., sec. 921; 4 Fed. Stat. Anno, p. 587.

Under similar statutes the state courts have held that consolidation must take place before trial, and that it cannot be had after judgment to facilitate and cheapen appeals.

> *1 Corpus Juris.,* p. 1134, text 57, 58; also p. 1132, text 29, citing Prinz v. Moses, Kan., 66 Pac. 1009.

It is also said that apparently the same conditions govern in Federal as in state courts respecting propriety of consolidation.

> *1 Corpus Juris.,* p. 1128, text 62.

In the cases of *Headrick v. Larson,* 152 Fed. 93, 96; *Louisville & N. R. Co. v. Summers*, 125 Fed. 719; and *Brown v. Spofford,* 95 U. S. 474, the irregularity of consolidating causes to be appealed on one record is pointed out, but because there was no objection the Court did not refuse jurisdiction of the appeals in the causes which were thus insufficiently before it.

In *United States v. Baltimore & O. S. W. R. Co.,* 159 Fed. 33, affirmed in 220 U. S. 94, the same was done on a stipulation made that all should abide the event of one judgment.

In the case at bar objection was made and exception noted (Trans. p. 43), and no stipulation was

made. Therefore, this Court should refuse to entertain any appeal except in the one cause and record before it.

CONCLUSION.

The decree of dismissal should be affirmed.
Dated March 24, 1916.

Respectfully submitted,

E. J. FOULDS,
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and
DEVLIN & DEVLIN,
Attorneys and Solicitors for Appellees and Defendants.

COPY

No. 2729.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ENNIS-BROWN COMPANY,
a Corporation,
Appellant and Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY,
a Corporation, and SOUTHERN PACIFIC
COMPANY, a Corporation,
Appellees and Defendants.

Additional Points and Authorities of Appellees and Defendants.

E. J. FOULDS,
WM. H. DEVLIN AND
DEVLIN & DEVLIN,
Attorneys and Solicitors for Appellees and Defendants.

Filed this day of 1916.

FRANK D. MONCKTON, Clerk.

By Deputy Clerk.

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ADDITIONAL POINTS AND AUTHORITIES FOR APPELLEES AND DEFENDANTS.

These additional Points and Authorities are presented to the court pursuant to leave given on oral argument. They are supplemental to those already printed and filed and to the oral argument; and appellees adhere to all that has heretofore been contended. There seems after fuller reading to be little which needs to be added. The additions follow designated by *letter* with parenthetical references to

Appellees' Points and Authorities and to Appellant's Brief; so that matter to which this is additional or responsive may be identified easily.

The appellees have endeavored by a seasonable objection to appellant's praecipe (Trans. p. 90) to eliminate all needless matter from the record prepared for this appeal. There are papers in the record which might have been left out by strict compliance with New Equity Rule 75(c). Nevertheless counsel take it that this court will consider this done because it ought to have been done, and will consider the salient questions as if only the bill and amendments, the motions to dismiss or transfer, and the decree were incorporated with the appeal papers.

A.

The point that objection to jurisdiction in equity was not waived has been made (Appellees' Points, pp. 39-43) in response to appellant's contention (Appellant's Brief, p. 81 *et seq.*)

It may be added that such objection could not be waived if the court chose to consider it. An objection to the jurisdiction of the suit, as distinguised from that of the persons, is not waived by mere failure to object. The court may decline of its own motion to exercise an improper jurisdiction.

> "If it develops, upon the hearing, that only legal rights or rights cognizable in a court of

> law are involved, the court *ex mero motu* will dimiss the bill." *New Jersey, etc. Lumber Co. v. Gardner-Lacy, etc. Co.*, 178 Fed. 772, 781. [This was a quiet title suit presenting substantially the same questions as to possession which are now at bar.]

Whatever the jurisdiction may be appears upon the face of the bill, and objection to the jurisdiction can be raised at any time, or at any stage of the case, even in the Appellate Court and even upon the court's own motion.

See *Southern Pacific Railroad Company v. United States*, 200 U. S. 341, 50 L. Ed. 507, wherein it is said:

> "No objection was made to jurisdiction of the court as a court of equity by any pleading or before the hearing. It is undoubtedly true that a suit in equity cannot be maintained when there is a plain, adequate and complete remedy at law. Such is the mandate of the Revised Statutes (Rev. Stat., Sec. 723, U. S. Comp. Stat. 1901, p. 583) as well as the general rule in equity. Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70; Killian v. Ebbinghaus, 110 U. S. 568, 28 L. Ed. 246, 4 Sup. Ct. Rep. 232; Litchfield v Ballou, 114 U. S. 190, 29 L. Ed. 132, 5 Sup. Ct. Rep. 820; Allen v. Pullman's Palace Car Co., 139 U. S. 658, 35 L. Ed. 303, 11 Sup. Ct. Rep. 682. It is also true that this objection need not always be raised by some pleading, but may be presented on the hearing even in the Appellate Court; and, if not suggested by counsel, may be enforced by the court on its own motion. See authorities just cited. But, on the other hand, it is equally true that where the objection that the plaintiff

has an adequate remedy at law is not made until the hearing, and the subject-matter is of a class over which a court of equity has jurisdiction, the court is not necessarily obliged to entertain it, even though, if taken *in limine*, it might have been worthy of attention."

And in *Street Grading District No. 60 v. Hagadorn*, 186 Fed. 451-457, it was held:

"It is also contended that, as no objection was made to the jurisdiction in equity on the ground that there was an adequate remedy at law, such objection was waived and cannot be raised for the first time in this court. This, we think, is untenable. The rule frequently announced and fully recognized that the existence of an adequate remedy at law cannot be raised for the first time in an appellate court is always subject to the qualification that jurisdiction over the subject-matter exists, and that the trial court is competent to grant the relief prayed for. Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70; Reynes v. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. Ed. 934; Brown v. Lake Superior Iron Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 33 L Ed. 1021; Allen v. Pullman's Palace Car Co., 139 U. S. 658, 662, 11 Sup. Ct. 682, 35 L. Ed. 303; Southern Pacific v. United States, 200 U. S. 341, 349, 26 Sup. Ct. 296, 50 L. Ed. 507. The doctrine of these cases is that the court for its own protection and *sua sponte*, 'may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested.'"

See also *Kansas City Southern Ry. Co. v. Quigley, et al.*, 181 Fed. 190-196, in which it is held whether

a bill states a cause of equitable cognizance is jurisdictional. The question, therefore, may be raised by the court on its own motion; and since the lower court might have dismissed this case of its own motion on finding no cause in equity made out, the power to do so remained to it and the decree of dismissal is sustainable without regard to waiver or non-waiver.

B.

Complainant-appellant relies on the allegations in its amendment to the amended bill, viz., allegations that public interest and welfare are opposed to exclusive occupancy of the described land by defendant Southern Pacific Company.

The theory seems to be (see Appellant's Brief, p. 47 *et seq.*) that some equity can be drawn to complainant, a private claimant, by asserting that defendant, a quasi public occupant, has a right inferior to the general public's alleged higher use and necessity. The bill does not in any way plead anything which entitles complainant to represent the public, nor could a decree follow which would be effective in favor of the public which is not a party plaintiff.

If paragraph IX of the bill in its final form (Trans. p. 18) means that the lands are such as the public may condemn to a superior use, then the obviously adequate legal remedy is a condemnation proceeding under California Code Civ. Proc, Sec.

1238 *et seq.* On the other hand, if it means that the public already owns such superior right and use, a suit by the public or its accredited representative must be brought with appropriate allegations of the right to sue.

A position quite similar to that of complainant here was made in an ejectment action against a railroad company to recover all of a 400-foot strip except a 25-foot strip used for tracks. Tenants of the company were in possession of the disputed part. In reversing the judgment rendered against the company the court said:

> "The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; and at any rate a forfeiture for misuser could not be enforced in a private action." Northern Pac. R. Co. v. Smith, 171 U. S. 260, at 276, 43 L. Ed. 157.

This is a complete answer to any claim either at law or in equity which complainant makes by the present bill. The same reasons move the court in a late Federal case to deny the right to oust a public common carrier from enjoyment of its easement charged with a public use. See *Western Union Tel. Co. v. Georgia R. & B. Co.*, 227 Fed. 276, at p. 290, citing *Northern Pac. R. Co. v. Smith, supra,* and other cases.

C.

Dismissal of the bill without transfer was proper, because as shown (Appellee's Points and Authorities, p. 37, also Trans. p. 45) the complainant declined the opportunity of repleader; hence it cannot be told what legal cause of action it would rely on to claim a transfer. The court can see that a cause of action for damages *might have existed* in favor of the owner of the land at the time it was appropriated by defendant Southern Pacific Company, or its predecessor, to the public use; but nothing appears to show that such a cause *does now exist* or that it belongs to complainant. There was nothing to transfer in that aspect of the bill. Viewing it as a bill to oust defendants in favor of a higher public use, a similar and equally fatal defect in parties plaintiff and in the substantial allegations appears. It is not a case of complainant's pleading itself in the wrong court, but of pleading itself out of court.

Complainant-appellant relies on amendments to the Judicial Code, Secs. 274a, 274b. For all present purposes these do no more than is promulgated by New Equity Rules 22 and 23, and their application has been discussed in Appellees' Points and Authorities, p. 37. None of the cases cited by Appellant's Brief, p. 111, hold that a futile transfer should be made under the Rules. In all of them there was an apparent right or liability to be tried between the parties. The obvious purpose of New Equity Rule

22 and of the above amendments to the Judicial Code was to accelerate the proper disposition of the case in one action by suitable amendments and transfer to the proper side of the court.

The bill in its final form stated no cause in equity for reasons already fully presented. It made no case for ejectment because of the nature of the occupation pleaded by complaint. It made no case for damages because complainant did not by allegations entitle itself to recover damages. It made no case therefore on any view of the bill, and when complainant declined to amend no alternative but dismissal remained to the trial court. New Equity Rule 29 contemplates dismissals for "insufficiency of fact;" and refutes any suggestion that Rule 22 requires a transfer whenever there is insufficiency of facts to make out an equity case. It was never meant to force the circuity of a transfer in order to enter a final adverse decree for defenses and deficiencies apparent on the face of the bill.

D.

Appellant argues (Appellant's Brief, p. 73 *et seq.*) that the remedy by action for damages is inadequate because it would admit rightful possession in the defendants, whereas only a small portion is in rightful possession or devoted to public uses. This proves too much. It shows that ejectment would lie as to

the portions not devoted to public use and damages for the other portion.

But there is an equally decisive answer to this argument furnished by paragraphs VIII and IX of complainant's bill in its finally amended form. (Trans. pp. 16-18.) From these allegations we learn that Southern Pacific Company was in possession of all the land. Part of it was used for "main tracks," and the remainder for "switching tracks," "freight sheds" and "sheds used as a wharf." All these are within the purposes enumerated in California Code Civ. Proc., Sec. 1238, Subd. 4, for which right of eminent domain may be exercised. Wharves and "railroads," not merely "main tracks," are expressly mentioned. Hence the complaint alleges that *all* the land is already devoted to uses which will support a condemnation or other acquisition for the public. This precludes all actions except for damages. See

Gordon v. Cadwalader, 51 Cal. Dec. 328 (decided March 8, 1916);
Gurnsey v. Northern California Power Co., 160 Cal. 699;
Northern Pac. R. Co. v. Smith, 171 U. S. 260, 176, 43 L. Ed. 157, 163;
Roberts v. Northern Pac. R. Co., 158 U. S. 1, 39 L. Ed. 873.

A railroad can condemn for wharves and freight sheds.

Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545;
Central Pac. R. Co. v. Feldman, 152 Cal. 303.

California Civil Code, Sec. 465, Subd. 4, empowers railroads to lay out their roads "not exceeding ten rods wide, and to construct and maintain the same with *one or more tracks* and with such *appendages and adjuncts* as may be necessary for the convenient use of the same."

The same section in Subd. 9, empowers them "to erect and maintain all necessary and convenient buildings, stations, depots," etc. These measure the purposes comprised in the word "railroad" found in Code Civ. Proc., Sec. 1238, Subd. 4, above referred to.

There is nothing to show that more than ten rods has been taken and all the pleaded uses are within the foregoing statutes and decisions.

Appellant argues that its suit is maintainable in equity, supporting such argument by the citation of various cases in which equity is said to have entertained jurisdiction of a suit for injunction against a public service corporation which was occupying and claiming land without right. It is not easy to see how a case of injunction for trespass under color of eminent domain, or injunction against interference with easements under color of eminent domain, can be a precedent for the maintenance of a suit in equity by one out of possession to quiet his title against the

claims of a railroad company occupying land which it had the right to acquire by condemnation. The injunction cases, by a well-known rule of equity must be predicated upon an undisputed legal title in the plaintiff, whilst the very object of the suit at bar was to quiet a dispute in titles. There is no analogy between the two classes of cases from which it may be reasoned that equity will entertain the suit to quiet title, because it might have entertained a suit for injunction if seasonably brought.

In Lewis Eminent Domain, 3d Ed., Secs. 901 to 953 inclusive, are discussed the remedies for a wrongful interference with property under color of eminent domain. The only equitable remedies mentioned in the one hundred pages comprised in these sections from Mr. Lewis' work are injunctions, and all of such injunctions proceed either on the theory of restraining the commission of a continuing trespass on the plaintiff's land or upon the theory of restraining a disturbance of some easement claimed by the plaintiff in a street or other place occupied by the corporation.

The bill of complaint in its finally amended form in the present case has none of the characteristics of a bill to prevent a trespass or the encroachment of defendants upon some easement claimed by complainants, but its theory is that the defendants are wholly without right, and that their title is a cloud for the court to quiet by its decree.

E.

Appellant's argument (Appellant's Brief, p. 81 *et seq.*) that the answer has imparted equitable jurisdiction even if the bill lacked it is not well founded. When complainant added paragraphs VIII and IX to the bill a *new case* was made, and the whole repoened for any appropriate objection or pleading. This is explained in *State v. Mitchell,* 104 Tenn. 336, 58 S. W. 367 (quoted from by appellant, p. 94), also in Appellees' Points and Authorities (p. 40 *et seq.*).

As to the plea of equitable estoppel being a legal defense, it is now expressly enacted by Judicial Code, Sec. 274b, that in all actions at law equitable defenses may be interposed by answer. Therefore interposing them can no longer be regarded as giving an equitable character to the action.

The argument that objection was waived is further answered, ante under letter "A" of this Brief.

F.

It was practically conceded on oral argument that the attempted consolidation was abortive. Appellee's oral argument on that point was stopped by the court. It may be passed with a simple reference to the Transcript. It there appears that the petition was for a single appeal by the one complainant Ennis-Brown Company (Trans. p. 48). The order permitting appeal (Trans. p. 55) and the bond (Trans. p. 56) are also single and run to an appeal by that one

complainant without other being joined. The appeal before this court is therefore in but the one suit entitled Ennis-Brown Company, a Corporation, against Central Pacific Railway Company, a Corporation, Southern Pacific Company, a Corporation. The other cases mentioned in the order of the court (Trans. pp. 42-43) have not been brought up.

G.

It is impossible to comment on each and every case cited by appellant as authority. Many of them are cited to general principles which are true enough, but which do not rule this appeal. It may be helpful to the court to comment on them by groups as cited under the several heads of Appellant's Brief, viz.:

Suits under California Code Civ. Proc., Secs. 738, 379, 380, are not equitable *per se* as stated by Appellant (Appellant's Brief, p. 12). The Supreme Court of California says such a suit "is a statutory action" which may be either legal or equitable.

Donahue v. Meister, 88 Cal. 121, 127.

The cases cited by appellant (Appellant's Brief, p. 12) no doubt hold that enlarged equitable rights created by state statutes will be enforced in Federal equity courts. That is not the point. Appellant is trying to keep a bill in court which pleads a simple cause at law, simply because in a state court having no distinct equity procedure might, under the statute, ignore such distinction.

Whether the bill might satisfy the California statute (Appellant's Brief, p. 24) is wholly irrelevant to the question which side of the Federal courts should entertain it. However if that be gone into, it will be found that after the last amendment the bill was pleaded out of California Code Civ. Proc., Sec. 738, and stated no cause of action under it even by California practice. (See this argued Appellees' Points, p. 25 *et seq.*)

The cases cited by its counsel do not support Appellant in the statement (Appellant's Brief, p. 29) that the Federal courts will take jurisdiction of a bill which has only the allegations required for a state court. On reading those cases it will be found always that plaintiff had possession or else the land was wild or unoccupied, or else that possession was immaterial because there was another ground for jurisdiction. The removal of clouds is an ancient head of equity; but every case where Federal Equity Courts have retained quiet title suits falls into one of the following classes:

(a) Where plaintiff had possession alleging it;

(b) Where the land was wild or vacant and neither had possession;

(c) Where possession was put in issue necessitating trial of the fact;

(d) Where some other equity supported the jurisdiction, such as accounting; and quieting of title was a mere incident.

Appellant has cited some cases, notably *Ely v. New Mexico R. Co.*, 129 U. S. 291, 32 L. Ed. 688, which were appeals from state or territorial courts to the United States Supreme Court. The procedure approved in such cases is the local and not the Federal procedure. They are not in point here.

None of the cases (Appellant's Brief, pp. 36-39) support the argument that possession alleged to be in one defendant can be ignored for the purpose of retaining the bill as to another defendant. To do this would be to deny a defendant its legal defenses and right of trial by jury by the mere expedient of joining some other party and giving the allegations an equitable cast.

All the cases cited by appellant at page 40 of its brief fail to help its case. They fall within the four classes just mentioned, while appellant's bill falls without them.

The same is true of cases cited at pp. 45-73 of its brief, so far as they are quiet title suits. Most of them are not such. Some are based on independent equities. Some are ejectment actions. Some are eminent domain cases involving streets of which no one could be in possession. Some suggest *a* remedy in equity for a taking under color of eminent domain, but not *this* remedy which appellant seeks.

Cases cited by appellant from p. 73 to 150 of its brief have been met, as counsel believe, by arguments herein and in Appellees' Points and Authorities.

and by those made orally. Most of the cases are sound and the holdings correct, but their doctrine inapplicable to present questions. The labor of reading all of them would not be lessened by a piecemeal analysis. Increased labor might be imposed on the court by the great length of brief required for such analysis. Hence we pass them.

Appellant's Brief, p. 111. This was met by Appellees' Points at p. 36. If appellant chose not to amend so as to make a transferable case, it cannot complain of a dismissal on the bill as it stood.

The same is true of appellant's argument that dismissal should have been without prejudice (Appellant's Brief, p. 112).

Dated April 17, 1916.

Respectfully submitted,

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No. 2729

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United States Circuit Court of Appeals

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ENNIS-BROWN COMPANY (a corporation),
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Appellees and Defendants.

APPELLANTS' REPLY BRIEF.

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Filed
APR 24 1916
F. D. Monckton

Filed this.....day of April, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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APPELLANTS' REPLY BRIEF.

I.

Appellants, in making as short as possible, this, their brief in reply to the two briefs of appellees, content themselves with relying upon their opening brief wherever possible.

II.

Appellants entertain no doubt but that the amended bills of complaint state facts sufficient to constitute valid causes of action in equity, nor have they any doubt as to the sufficiency of the authorities cited in their opening brief, pages 11 to 81, upon the question of

jurisdiction. They therefore rest in the main as to those matters upon their opening brief.

III.

It is said in Foster's Federal Practice, fifth edition, at page 1199, that

> "The provisions of the equity rules and other regulations of practice are chiefly designed to facilitate the speedy and orderly progress of a cause to a hearing."

The conduct of defendants with reference to the equity rules, resulting in unjustified delay in the pending suits, has caused certain collateral questions to be brought up on this appeal. Appellees at oral argument and in their briefs contest the right of appellants to bring up a record sufficient to show intermediate orders of the court below which appellants seek to have this court review.

> "Upon an appeal from the final order or decree every interlocutory order affecting the rights of the parties regarding the matters in question between them is subject to review in the appellate court and may be heard and decided at the same time."
>
> Western Union Telegraph Co. v. United States & M. T. Co., 221 Fed. 551.

> "An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of the appellant; including a prior decree of that court from which an appeal was dismissed under the rules of this court." (Head note.)
>
> Buckingham v. McLean, 13 How. 150; 14 L. ed. 90.

The Rules and Statutes provide that the whole record may be brought up: Equity Rule 75; C. C. A. Rule 14; S. C. Rule 8; Secs. 698, 750 Rev. Sts.

IV.

Appellants especially request the court to consider, as showing the foundation of Equity Rule 32, the authorities cited and the reasoning given in pages 81 to 111 of their opening brief. Therefrom it will be concluded that Equity Rule 32, as might be expected from any rule adopted by the United States Supreme Court, has a most substantial basis and serves a most useful purpose in the full scheme of the New Equity Rules.

V.

It will be necessary to reply to certain matters more in detail.

Appellants do not contend that defendants may not object at any time to a complainant's failure to state facts sufficient to constitute a valid cause of action. As we understand the law, the court may at any time move of its own motion on the ground of insufficiency of facts stated to constitute any cause of action at all. If, however, a bill states facts sufficient to constitute any valid cause of action, diversity of citizenship being shown and it being competent for the court to grant the relief sought, it cannot be objected that such stated cause of action is not valid in equity, after the defendant

has waived all objection to jurisdiction in equity in the cause stated. Such is the status in the pending suits. The motion to dismiss is directed to the alleged insufficiency of facts to constitute a cause of action *in equity.* (See Tr. p. 23, I.)

Defendants (appellees) admit that the original bills state facts sufficient to constitute valid causes of action under the laws of California. In appellees' first brief it is stated, at page 2:

> "The original complaint was an action to quiet title and undoubtedly sufficient in form under the law of the State of California. In the original complaint there was no averment as to whether or not the complainant was or was not in possession, or that defendant Southern Pacific Company was or was not in possession."

Diversity of citizenship is alleged (Gillis v. Downey, appellants' opening brief page 30); it is competent for the court to grant the relief (Cobban v. Conklin, 208 Fed. 231, appellants' opening brief page 84).

The defendants answered without objection and under such circumstances (Tr. pp. 75-82 and 83) as to show a voluntary and intentional submission to jurisdiction in equity.

The grounds assigned for motions to dismiss show that the motions go to the allegation of possession in the amended bills which in fact was the only allegation added and the only change by amendment from the original bills at the time of making the motions to dismiss. The allegation can have no effect whatever upon the pleading, except as showing a remedy in an

action at law; and objection on that ground defendants had waived. It was open to defendants, at the time of filing their original answers, to object to jurisdiction on account of possession in the Southern Pacific Company; if defendants did not wish to waive objection on that ground, such action should have been taken *in limine* as was done in Union Pacific R. R. Co. v. Cunningham, 173 Fed. 91, which was by plea. Under the new rules, the objection, of course, should have been taken by corresponding motion or in the answer. No allegation as to possession could revive the right to object on that ground. The facts essential to the statement of cause of action remain the same in the amended as in the original bills. The objection on account of amendment is to the form and not to the substance of the cause of action stated. Nowhere is any ground set out for the motions to the effect that the bills, as amended, do not state sufficient facts to constitute any cause of action to quiet title; if the technical requirements of federal courts, proceeding independently of state statutes, as to possession, be eliminated, it is admitted that the amended bills state facts sufficient. It is solely upon such grounds as defendants might waive and had waived that the motion is made.

The opinion of the lower court (Tr. p. 27, last paragraph) states that the ground for motion is that the bill does not state facts sufficient to state a cause of action *cognizable in equity,* and goes on to specify that such is true *because of the showing as to possession.*

The first brief of appellees, pages 7 to 15, is devoted to an argument as to the insufficiency of the amended

bills because of the allegation as to possession. It is not claimed anywhere that the objection to the amended bills is directed to anything in the amended bills, except the allegation of possession. Upon argument and in their second brief appellees repeat the ground of objection as being to possession in the Southern Pacific Company, defendant.

In appellees' first brief the points relied upon are set out at pages 6 and 7. Point One states that

> "The complaint stated no cause of equitable cognizance because it appeared that complainant was out of possession and a defendant was in possession and occupation of the premises. The legal remedy is adequate."

If it be held that the amended bills of complaint (the word complaint used in the foregoing quotation evidently refers to the amended pleading of complainant) do not state facts sufficient in equity and that the objection upon the ground of the existence of a legal remedy was not waived, then Point Three, namely,

> "The complaint stated facts showing no cause of action in favor of complainant at law or in equity"

follows. The suits are brought under a statute and no effort was made to state a cause of action in damages. Yet the objection to complainants' pleading is not that the amended bills do not contain facts sufficient to state causes of action under the statute but simply that there is no jurisdiction in equity and is not the objection which is ordinarily had in mind when parties object that a bill does not state facts sufficient to constitute any cause of action at all, for it is conceded that the amended bills of complaint do state matters sufficient

in substance to charge the defendants with a breach of law.

In Jacob v. United States, 13 Fed. Cases No. 7157, it is said:

> "It is defect of form whenever the defendant must of necessity be guilty of a breach of law and have incurred the penalty for which the suit was brought if the allegation of the declaration be true. This constitutes the difference between form and substance."

As stated before, an allegation of possession was the sole allegation added in the amended bill, and consequently the only subject of objection. Defendants, however, eliminate, by reason of the allegation as to possession, admitted good statements of causes of action to quiet title, and then say that no cause of action is stated at all, since the amended bills show complainants have a remedy in an action for damages, and fail to state sufficient facts for that cause of action. They bring appellants to the defective statement of any cause of action only by eliminating a statement of cause to quiet the title, admittedly good except for the existence of a legal remedy in damages, an objection which defendants could not have urged at that time, even if it had existed.

Everywhere, in the motion to dismiss, in the opinion of the lower court, in the briefs of appellees and in the oral argument it is shown clearly that the primary objection is directed alone to the presence of the allegation of possession in the Southern Pacific Company, and the consequent legal remedy.

The allegation of possession in the defendant, Southern Pacific Company, was in the answer of defendants already filed and most conclusively was within the knowledge of defendants and could have been made a ground of objection when defendants answered originally (Rule 29). As soon as complainants inserted the allegation in their pleading, the defendants moved to dismiss, because they say (Tr. p. 24, motion to dismiss) the amended bills show that

> "if the said plaintiff has any remedy at all, it is in an action at law for damages."

See

Hoogendoon v. Daniel, 178 Fed. 767.

Defendants had already waived their right to object, if any they ever had, on the ground that the amended bill did not state facts sufficient to constitute a valid cause of action in equity because of the existence of a remedy in an action at law. There was but the one suit (or set of several suits) and in it (and in each of them) the objection to proceeding in equity to quiet the title had been waived and that waiver, as we understand the law, extends throughout the life of the proceeding. If a defendant moves to dismiss (demurs) upon a special ground and the motion is denied and time given within which to answer, the defendant may not thereupon demur generally instead of answering. Likewise, if a defendant by conduct or otherwise waives his right to object to jurisdiction in equity, it being competent for the Court to grant the relief prayed, and he is granted (Rule 32) time within which to answer, he may not refuse to answer and move to dismiss gen-

erally without being in default, if the bill states a good cause of action. Such, according to our view, has always been the rule; with particular reference to the new equity rules, it is said in Boyd v. N. Y. & H. R. Co., 220 Fed. 178:

> "One, who demurs generally nowadays, must be understood to do so not only on what complainant shows but also after having his own conscience purged. Thus only is avoided the old and bad habit of trying everything else before stating facts."

If our interpretation of the new rules be correct, the record in the pending cases shows a most flagrant disregard of them and the course of the pending suits in the lower court shows no improvement over conditions which existed prior to the new rules. By this statement, however, we do not mean that the successive steps taken by defendants find approval in good practice prevailing before the adoption of the new rules. New Equity Rule 32 is a practical readoption of former Rule 46. The United States Supreme Court in its revision of the Equity Rules in 1912 no doubt considered the need of Rule 32, else it would not have been readopted. The purpose of the Equity Rules is declared in the decisions and in the text books generally to be in aid of the speedy determination of causes.

If defendants may receive the advantages of opposition to compliance with the new rules with impunity, what protection have complainants generally and these appellants particularly against such unjust delay and studied disregard of rights given by the rules as the record here discloses appellants to have suffered? If

defendants may be permitted to go back to the lower court to begin the pending suits at a point where the suits were practically two years ago, then what is to deter defendants, in position of advantage with respect to property, from pursuing such a course as defendants have followed in order that further delay may result while defendants are enjoying the benefit of their possession?

VI.

If there is not, by reason of their allegations, jurisdiction in equity over the amended bills of complaint, the suits were, of course, properly dismissed, provided the defendants had not waived their right to object to jurisdiction in equity; but if the suits were properly being prosecuted in equity, then the decrees of dismissal were erroneous and no order of the court below could operate to revive the right in defendants to file a new or supplemental answer, made after the time provided by Rule 32 within which such new or supplemental answer should be filed, and no order attempting to excuse the defendants from filing a new or supplemental answer has any effect if made subsequent to the time that defendants came into default. Where Rule 32 provides that a new or supplemental answer shall be filed within ten days after the filing of the amended bill unless it is otherwise ordered, an order, if made, extending the time, directing the original answer to stand, or otherwise providing, must be made within the time given to answer. Such is the law in all jurisdictions.

VII.

The lower court made no order of dismissal until the 20th day of December, 1915. The record discloses that on December 1st, the court granted a motion to dismiss (Tr. p. 40), but, so far from ordering the suits dismissed, the court gave the complainants time within which to amend, and as late as December 20th exercised jurisdiction in the proceedings as to many matters, and thereafter on December 20th ordered the suits dismissed. The mind of the court, as gathered from the successive steps taken in the suits after the granting of the motion to dismiss, shows clearly that the suits were not intended to be dismissed and were not dismissed until December 20, 1915, five days subsequent to the entry of the orders for decrees *pro confesso*. An opinion, even an order for a decree, is not a dismissal of the action, as is shown by the following authorities:

The decree of dismissal in the pending suits, made December 20, 1915, used the following language:

> "It is ordered * * * that * * * the cause be, and the same is hereby dismissed."

In Providence Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. ed. 762, on November 28, 1866, an order was entered on the minutes of the court confirming the master's report, that the exceptions "be and the same are hereby overruled"; fixing the amount of profits made by defendant in violation of plaintiff's rights and concluding

> "that the complainants do recover of respondents in this case the sum of $310,757.72, and costs, taxed at....."

Afterwards, on December 5, 1866, two days after the commencement of the December Term, a final decree, for the most part, in identical language, of the order of November 28th, was filed and entered.

The decree was "entered as of November 28, 1866."

The Supreme Court said:

> "This decree, it is seen, is for the most part in the very language of the order, but uses the introductory words appropriate to a decree, and describes particularly the patents in controversy, and ascertains the amount of costs taxed. It omits the explanatory directions of the order as to the bond to be given on appeal; but the entry of the decree is followed immediately by another entry stating that an appeal was prayed for by respondents in open court, and was allowed, upon filing a bond within ten days, with sureties, to the satisfaction of the district judge.
>
> Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order settling the terms of the decree to be entered thereafter; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause.
>
> We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the circuit court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree.
>
> It appears to have been entered 'as of the 28th of November.' But this circumstance did not affect the rights of parties in respect to appeal. Those rights are determined by the date of the actual entry, or of the signing and filing of the final decree. That test ascertains for the purpose of

> appeal, the time of rendering the decree, as the 5th of December, 1866. The appeal in this case, therefore, was rightly taken to the present term."

In United States v. Gomez, 17 L. ed. 677, 679, it is held that time in which appeal may be taken does not begin to run from the date of filing of opinion of the court in which it is ordered that a decree be entered up in conformity to such opinion, but from the date of the signing and entering of the decree itself.

This was a petition for the confirmation of a land claim and the case came before the Supreme Court upon motion of the appellee to dismiss the appeal.

Opinion of the lower court confirming the claim was delivered on June 5, 1857, more than five years before the appeal was taken, the entry being that a decree was ordered to be entered in conformity with such opinion. No decree of any kind, however, was drawn up, entered or filed on that day.

On January 7, 1858, a decree was filed in the case, and the decree, after referring to the fact that the claim had been confirmed on June 5, 1857, stated that

> "having been omitted to sign and enter a decree therefor at the date last aforesaid, it is ordered that the same be done now for then."

The court said:

> "Plainly there was no decree of any kind in this case until the 7th of January, 1858 * * *."

The suits were not dismissed until an appealable order or decree was made and entered.

Notley v. Brown, 208 U. S. 429; 52 L. ed. 559.

A "judgment" is a final determination of the rights of the parties to an action; while every direction of the court made or entered in writing but not included in the judgment is denominated an "order".

Sellers v. Union Lumber Co., 36 Wis. 398.

Lower court ordered that unless an appeal be taken, etc., a summary judgment therefor be entered, etc. Appeal was taken, and the Supreme Court, speaking through Chief Justice Waite said:

> "It is true that if appeal had not been taken the requisite decree (judgment) might have been obtained; but it is equally true that until a decree is actually entered the Court retains the power to withhold it."
>
> Ex parte Sawyer, 22 L. ed. 618.

> "The direction to enter a judgment in the judgment book is mandatory because it imposes a public duty upon a ministerial officer. In a proper case, if the clerk's fee is paid, he will, on motion either of the plaintiff or defendant, be compelled by the Superior Court to enter a judgment of dismissal or nonsuit. * * * *But until the judgment is entered, the action is not dismissed.*"
>
> Page v. Superior Court, 76 Cal. 373-4.

A "judgment" is the final consideration and determination of the court * * * and it is only evidenced by a record. * * * An *order* for a *judgment* is *not* the judgment, nor does the entry of such order partake of the nature and quality of a judgment of record.

Whitwell v. Emery, 3 Mich. 84, 88; 59 Am. Dec. 220.

The clerk must keep an "Equity Journal in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time."

> "Fact that a judge had expressed a willingness to make a desired order, when no such order was actually made, does not warrant the entry of such an order."
>
> Klein v. S. P. Co., 140 Fed. 213.

A dismissal is an appealable order or decree and as soon as a suit is dismissed the complainant has his right of appeal and of course that right is well known to run from date of entry of judgment or decree. Nor is the suit dismissed until an appealable decree is made and entered.

> Fowler v. Homill, 139 U. S. 549; 35 L. ed. 266;
> Notley v. Brown, 208 U. S. 429; 53 L. ed. 559.

It has been held that the following orders and decrees in equity are not final and cannot be reviewed by appeal. An order setting aside a final decree is not appealable where the appellant has obtained leave to amend.

> Fisher v. Simon, 67 Fed. 387.

It must clearly appear that appellant has refused to comply with the conditions before appealable.

> Herrick v. Cutcheon, C. C. A., 22 Fed. 6.

A statement on the records of the court:

> "A confirmed report, at best, stands in the same relation to a decree as a verdict to a judgment. It may be almost certain that the decree will follow it, but it cannot be enforced until the decree is entered."
>
> Scath & Co. v. Wilson (C. C. A.), 115 Fed. 284.

There was no order or decree in the cases until December 20th, from which an appeal might have been taken as the cases stood. An order of dismissal is appealable.

> "A decision containing directions for a decree is not considered as a decree."
> U. S. v. Gomez, 17 L. ed. 677;
> Re McCall (C. C. A.), 145 Fed. 898;
> Works v. Pac. Ry. Co., 76 Fed. 941.

It has even been held that the clerk may refuse to enter a decree until his fees are paid; and that although left in the clerk's office, it is not effective.

> Owmen v. Talcott, 180 Fed. 925.

Appellees are not very specific in pointing out how the court had jurisdiction for the purpose of setting aside decrees *pro confesso* on December 20th and at the same time lacked jurisdiction to order the consolidation of the sixteen suits. At page 42, their first brief, appellees refer to an order for dismissal as avoiding the effect of a consolidation and at page 32 they refer to an order of dismissal as preventing the entry of the decrees *pro confesso;* yet when it comes to the court making an order setting aside the decrees *pro confesso* on December 20th, the alleged order of dismissal seems to lose its potency and to in no way affect adversely the order of the court setting aside the orders for decrees.

The fact is, there was no order of dismissal and the suits were not dismissed until after each and all of the several orders and proceedings herein referred to were taken and had, and upon such a theory alone

can the many steps taken in the suits by both sides and by the court between December 1st and December 20, 1915, be accounted for.

Even if the orders for decrees pro confesso were not regularly entered by reason of action of the court on December 1, 1915, the application of complainants for orders for decrees pro confesso are yet pending and are the subject of proper order by this court, if the decrees of dismissal were erroneous.

VII.

A MERE REVERSAL OF THE DECREES OF DISMISSAL WILL NOT SATISFY THE DEMANDS OF JUSTICE IN THE PENDING SUITS AND FOR THAT REASON APPELLANTS INSIST THAT IF DEFENDANTS WERE OR ARE IN DEFAULT COMPLAINANTS ARE ENTITLED TO FINAL DECREES AS TO THE WHOLE BILLS AS AMENDED (see appellants' opening brief, p. 119).

Soon after the practice of taking bills as confessed, without requiring proof, was first adopted in the Chancery courts of England, Lord King overruled a decision of the master of the rolls, which allowed the whole bill to be taken as confessed for want of a further answer.

Hawkins v. Crook, 2 Peere Wms. 559.

However, a few months later, he in effect overruled his own decision in that case in Abergavenny v. Abergavenny, 2 Eq. Ca. Abr. 179; 4 Vin. Abr. 446, S. C.

In Davis v. Davis (2 Atk. 23), which was decided in the year 1739, the Chancellor likewise refused to be

bound by the decision in Hawkins v. Crook; and, in the subsequent case of Turner v. Turner (1 Dick. 316), he in effect, though not in terms, overruled the case of Hawkins v. Crook.

In 1772 the same question came before Lord Apsley in the case of Bacon v. Griffith (S. C. 2 Dick. 473). Here the master of the rolls had allowed the amendments to the bill alone to be taken as confessed, the defendant having answered the original bill before amendment, and Lord Apsley reversed the order upon appeal, his lordship being of opinion that, the original bill being amended, it was one record; and, the amendments not being answered, the record was not answered; and that the application should have been for the plaintiff's clerk in court to attend with the record of the bill in order to have the same taken *pro confesso* generally.

A similar decision was made by Lord Alvanley in the year 1799 (Jopling v. Stewart, 4 Ves. Jr. 619).

Subsequently, the master of the rolls, in a case presenting the same question similarly decided a case arising in Ireland—O'Grady v. Barry, Drury's Digest for 1839, page 80.

Thus, it will be noted, that, beginning with the earliest practice, it has been uniformly held in England that the original and amended bills constitute but one record, and that, the amendment not being answered, the record is not answered and may be taken *pro confesso* generally; that is, to the whole bill.

The case of O'Grady v. Barry, having been decided in the year 1839, brings us practically down to the date

of the adoption of Equity Rule 46 of the rules of 1842, and, from a reading of that rule, it is plain to be seen that the Supreme Court intended to adopt the practice as it then existed in England.

Equity Rule 46 provided:

> "In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer",

and Rule 32 of the present rules is a substantial re-enactment of Rule 46, being as follows:

> "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as in case of an omission to put in an answer."

So the rule is stated by Mr. Daniell in his work on Chancery Practice (1 Daniell Ch. Pr. 402):

> "* * * although it is the practice to call a bill thus altered an amended bill, the amendment is in fact esteemed but a continuation of the original bill, and as forming a part of it, for both the original and amended bill constitute but one record; so much so that where an original bill is fully answered and amendments are afterwards made, to which the defendant does not answer, the whole record may be taken *pro confesso* generally, and an order to take the bill *pro confesso* as to the amendments only will be irregular."

State practice requires that in order to have an answer to the original bill stand as an answer to the amended bill an order of court to that effect must be obtained, otherwise, defendant is in default upon the expiration of the time within which defendant is required to answer the amended bill.

Rule 46 (quoted above) has been construed in conformity with the English practice by the federal courts, the language above from Daniell being incorporated in the opinion of the court in Excelsior Pebble Phosphate Co. v. Brown, 74 Fed. 323, quoted in our opening brief at page 119.

See also French v. Hay, 22 Wall. 246 (22 L. ed. 856).

The following is the interpretation given by Ruling Case Law by a *direct reference* to present Equity Rule 32:

> "If an amended bill is filed after the original bill has been answered, a *pro confesso* may be taken against the defendant, if he fails to answer the amended bill within the time prescribed by rule or statute unless the time is enlarged (U. S. Eq. Rule 32."
>
> 10 Ruling Case Law 537, Sec. 320.

No application for relief from the orders for decrees *pro confesso* was made upon any ground of fact. An application to set the same aside upon the ground that the defendants were not in default was made and granted. If the defendants were in default, the orders vacating the decrees *pro confesso* were erroneous.

Defendants (appellees) did not come offering to do the thing they neglected to do which placed them in

default. There was no offer to answer. They stood very flatly upon their not being in default and asked for no relief at all except upon the ground of our alleged error.

In order to warrant the court in granting the motions to set aside the orders for decrees *pro confesso* the defendants must have shown the existence of the facts upon which the motions are based; that is, that defendants were not in default.

The question involved is purely legal. The complainants had leave to amend in the lower court. They chose to stand upon their bills as amended, claiming that in point of law they had the right to do so. The defendants had an opportunity to file an answer or a supplemental answer to the amended bills. They contended that the bills as amended did not state causes of action in equity and that they had not waived the right to object to proceeding in equity. They elected not to answer the amended bills, but chose to stand upon motions to dismiss, claiming that in point of law they had a right to do so. If the lower court should be affirmed by this court the complainants shall not ask leave to amend for they well know that such an application would be denied. They elected their course in law and they are bound to stand the consequences of that election. Likewise the defendants have elected their course and should be held to abide the consequences of their election.

VII.

The two briefs filed by appellees are devoted:

First.

To a discussion against jurisdiction which takes appellees to the conclusion that

> "It is not necessarily true that there must be an equitable remedy because there is none at law."
>
> First brief page 16.

Second.

To an analysis and classification, of all cases cited by appellants, into the four heads, suggested in first brief and set out at page 14, appellees' second brief. Counsel's classification is an accomplishment which no judge or text writer has heretofore ever undertaken and is a shining example of counsel's facility, as evidenced throughout appellees' briefs. Efforts heretofore to so classify suits quieting title have failed. As was said in Continental Trust Co. v. Tallassee Falls Manufacturing Co., 222 Fed. 694:

> "Of course, the courts have never undertaken to state all the instances where one out of possession can sustain a bill to quiet title. It would be impossible to do this, for the reason that each case must rest upon its own peculiar variety of facts and circumstances."

While appellants would not detract from counsel's worthy effort, they feel obliged to meekly suggest that the class of cases shown in United States v. Leslie, 167 Fed. 672, be included in the classification.

Third.

Finding Rule 32 in the path of their reasoning, appellees present other novel propositions of law and construction of the rules generally, but particularly of Rule 32, as shown at page 28, first brief, where it is said:

> "By terms of new Equity Rule 32 they had ten days to put in a new or supplemental answer after amendment of the bill. This was done by moving to dismiss,"

and at page 30, where it is said that the motion to dismiss can be deemed an amendment to the answer to the original bill, and again at pages 34 and 41 respectively,

> "The motion itself is an answer"
>
> "Since the answer now also includes demurrer, the motion is an answer, because things equal to the same thing are equal to each other."

Appellants are tempted to divide appellees' briefs, as *ancient* Gaul was divided, into three parts, as enumerated, and submit them, for they dislike to enter, in this court, upon a criticism of an argument which leads to such groundless conclusions, but appellants are before this court upon matters of extreme importance, both in law and in fact. Their contentions were overruled by the lower court from beginning to end and they wish to do every reasonable thing here in order that this court may fully understand the whole situation and in order that, if their appeals be not sustained, it may not be through neglect to fully apprise the court of appellants' contentions.

It is said at page 6 (appellees' first brief) that

> "An additional brief, fully answering and analyzing the points and authorities of the appellant will follow."

In appellees' second brief, page 1, it is said

> "There seems after fuller reading, to be little which needs to be added."

The second brief, is, in the main, repetition.

Appellants cite and rely upon New Jersey, etc. v. Gardner-Lacy Lbr. Co., 178 Fed. 772 cited in appellees' second brief, top of page 3. Appellants fail to see how appellees can find any comfort in that case notwithstanding it

> "was a quiet title suit presenting substantially the same questions as to possession which are now at bar."

In that case, the lower court declined jurisdiction and the Circuit Court of Appeals reversed the decree.

At page 6, same brief, appellees quote from Northern Pac. R. Co. v. Smith, also cited and relied upon by appellants. The paragraph quoted by appellees is preceded by the following:

> "By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only 25 feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within 200 feet of the track of the railroad as actually constructed, and that the railroad com-

pany was in actual possession thereof by its tenants."

The point which we have been seeking to make upon this appeal is that in the pending suits there has never been any sort of a determination of the question of necessity but that the claim of the defendants is "without right". The question of a forfeiture does not arise in the pending suits.

> "Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiae.*"
>
> Osborne & Co. v. Missouri Pac. R. Co., 147 U. S. 248; 37 L. ed. 155, 161.

Throughout the briefs of appellees there is a suggestion that the decree in a suit in equity of the character of the pending suits means dispossession of the defendants. If the defendants had permitted the suits to go to trial, appellants' position always has been that, being suits in equity, the decree would be framed to meet whatever condition the evidence might disclose. Appellants have no right, notwithstanding they own the land, to arbitrarily dictate the width of the strip which the main track of the defendant, Southern Pacific Company, shall occupy. Appellants state that appellee, Southern Pacific Company, should be permitted to continue its main track. The form of decree suggested herein later shows appellants' attitude in this regard.

Appellees appear to be under the impression that appellants claim jurisdiction as to the Southern Pacific Company, in possession, by reason of the allegation in the amended bills that the defendant Central Pacific Railway Company is out of possession. It must be apparent to this court that appellants do not so contend, but rely upon the amended bills of complaint showing an inadequate remedy in an action at law against either of the defendants, independently.

The filing of the amended bills and the amendment to the amended bills is not to be construed as a concession that the court on the equity side had no jurisdiction (appellees' first brief p. 11). Upon oral argument it was shown, by reading statements made by the lower court at the time of arguing the motion to transfer to the law side at Sacramento, that complainants insisted that the court in equity had jurisdiction. This fact will be shown also by original assignments of errors 12 to 17; also a reference to the first paragraph of the amendment to the amended bill (Tr. p. 17) shows that the amendment is deliberately directed to the motion for particulars and not to the motion to dismiss and was not made as any sort of an admission of lack of equity in the amended bills. Appellants deemed it their duty to set out as full particulars as to all matters within their knowledge as it was possible for them to set out under the motion of defendants for further and better particulars. Complainants had previously offered to set out as fully as defendants might demand all matters as to complainants' claim of title to the property involved (Tr. top of p. 48).

At page 14, appellees' first brief, and at the same page of their second brief, it is said that complainants "have cited no case in which a bill solely for the quieting of title has been retained against a defendant in possession". Inasmuch as defendants distinguish all cases cited in our opening brief upon the ground that, while they are suits to quiet title, some element existed in them such as an outstanding deed or the loss of a record, or, in a word, that some cloud existed to be removed and the quieting of the title was incidental to removing the particular cloud, we have not been encouraged to look for a case which would satisfy defendants, for we think that none may be found. Where no cloud has existed we think there would be no occasion for a suit to quiet the title. However, the case of United States v. Leslie, 167 Fed. 672, not cited in our opening brief, should satisfy defendants upon the proposition that a defendant's being in possession is in itself no valid ground of objection to jurisdiction in equity.

At page 25 of appellees' first brief it is said that the allegations of the amended bills are equivalent to alleging that the land involved is impressed with a public use and that on this account complainants cannot recover without proof that they have title for and on behalf of the public, etc. The allegations of the amended bills in that regard simply go to show that the land described is highly susceptible of public use by reason of its location and is unusually fitted for public use, so much so that public policy will not demand that the owners of the fee, the proprietors of the land, should be forced to leave the land under the control of a single corporation relying solely upon protection in the name of public

policy. As was stated upon oral argument, the company is protected only to the extent that public policy protects it. If public policy does not demand the company's exclusive control of the property, then every other right in and to the property is in the owners of it.

The holding of land by a public service corporation may create a presumption of right to hold in the corporation but such a presumption is not conclusive and may be overcome by evidence in a suit by an owner of the land. Appellants in the pending suits do not represent any public body, it is true. It is difficult to see how any public body could force issue involving privately owned land, on account of the holding by the Southern Pacific Company, if the owners of the land did not act, and it is equally difficult to see how complainants, being the owners of the land, may not test the right of the company in possession to continue that possession since as owners they are entitled to all the rights which follow ownership and no rights appear herein as outstanding, excepting the right of the public service corporation to hold possession in so far as such corporation can rely upon public policy to protect it. The right to sue follows the ownership, the burden of showing an existing conflicting right is upon the occupant who is holding without title.

The condition described in Northern Pacific R. Co. v. Smith and Stuart v. Union Pac. Ry. Co., shows that public service corporations, railroads, may be in possession and that they may be sued in a suit to quiet the title where flexible, appropriate decrees can be made.

In the Smith case, supra, the company held under a Congressional grant which has been held to be the equivalent of an adjudication of the necessity for the taking. The court will observe that the excerpt from that case at page 6 of appellees' second brief is predicated upon that condition.

Complainants have the right to maintain their suits in equity against defendants in the same manner as they might against any individual who should withhold possession from them without right. The superior right which the defendants have by reason of being public service corporations will be evidenced in the sort of relief given the complainants. If they should show that it would be against the public interest to disturb the Southern Pacific Company's possession, then the decree would be appropriate. It is alleged in the amended bills that the claim of the defendants is without right. As was said in Northern Pac. Ry. Co. v. Smith, land can not be taken,

> "even in the exercise of eminent domain, without compensation",

and this court will not decree the right in appellees to withhold any part of the land without compensation; it will not be done because the Constitution forbids it.

Reference is made at page 26 of appellees' first brief to the recent decision of the California Supreme Court in Gordon v. Cadwalder, 51 Cal. Dec. 328, as holding that

> "there could be no action but one for damages for the taking of the land and applying it to public use without condemnation".

It is not our construction of the decision in that case that it so holds. The action was framed in damages and the necessity of the corporation (S. P. Co.) to hold was not questioned. Other California cases cited by appellees, as we read them, do not sustain, upon the same point, what is claimed by appellees for them. Gurnsey v. Northern California Power Company, 160 Cal. 699, is cited as furnishing the rule in California. That suit was brought in ejectment and no question raised as to the necessary use to which the land taken was devoted by the company. It was the case of an electric transmission line and the facts alleged showed the necessary use just as the allegation of a main line track upon the land involved shows a necessity as to a portion of the land for a continuous service. Likewise in cases where a right of way alone of a railroad company has been involved and the suit has been for possession of the land, plaintiffs claiming the right of possession independent of the question of the necessary extent of the use, it has been held, should sue in damages. Where the use has extended, however, to lands occupied by a corporation which are not "absolutely essential" to a continuance of service, we know of no case in California or elsewhere which holds that an owner of the land may not sue in equity to determine the conflicting rights to the property. If such a case does exist, it is contrary to the rule laid down in Northern Pacific Railroad Company v. Smith, 171 U. S. 260; 43 L. ed. 157, 161, and many other cases cited heretofore by appellants.

Besides, the general jurisdiction of federal courts in equity cannot be abridged by state rules of decision or statutes.

> "By the legislation of Congress and repeated decisions of this Court it has long been settled that the remedies afforded and modes of procedure pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules, and uses of equity having uniform operation in those courts wherever sitting. (Citing cases.) As was said in the first of these cases:
>
> > 'Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable.' "
>
> Guffey v. Smith, 59 L. ed. 864.

The rule insisted upon by appellees, namely, that possession by a public service corporation is conclusive of the right to hold, is plainly against the rights guaranteed by the Constitution. Our point can be shown briefly by illustration: Blank is absent in Europe. A public service corporation is incorporated; is making surveys and constructing its line of railroad; it enters upon and constructs its line over or across the front yard of the suburban home of Blank. The company encloses two hundred feet of Blank's lot, three hundred feet deep in all. A bond issue is placed upon all the right, title and interest of the railroad company in and to its property. Within two years, the company goes into the hands of a receiver. Blank returns and,

according to appellees' contention, he may sue in damages only for the taking of the land; he may not question the extent of the necessary use, however unnecessary the use to the full extent taken may be, or with whatever disregard of the ordinary rights of Blank the taking may have been exercised and notwithstanding he will evidently be unable to realize upon a judgment in damages.

Appellants cannot conceive of such a contention being sustained. It is contrary to sound principle and the reasoning is not such as recognizes the constitutional rights of individuals in dealing with others, even though they may be public service corporations in the exercise of eminent domain.

In the Roberts case the doctrine against ejectment in favor of public service corporations is expressly declared to extend only to land which the company might condemn. If that be the test, how can the mere fact of taking possession be conclusive of the question of necessity in favor of a railroad corporation? All that a corporation would need to do, if the taking were conclusive, would be to allege that the land in its entirety is necessary, whatever its extent might be and what is said in the Roberts case would have no application whatever.

In the Stuart case no claim is made by the railroad company to any portion of the land involved excepting as to a strip four hundred feet wide. About this strip the real controversy turned. If the court took into consideration in that case, in determining jurisdiction, the fact that other lands, to which the railroad corporation

made no claim, were included, all complainants generally would have to do in order to circumvent objection to jurisdiction would be to join other lands with the land occupied by the railroad company. The fact is, jurisdiction was exercised in the Stuart case because, as Judge Van de Vanter said, a complainant has no remedy adequate in law against a railroad company in possession and claiming the right to hold as a public service corporation.

The limitations upon jurisdiction in equity are found in the statutes, and, of course, in the constitutional provision for trial by jury. It is almost idle for appellants to say that in neither statutes nor Constitution is the word "possession" found, as affecting jurisdiction. Appellants are satisfied that there is but the one test of jurisdiction in equity, and that is whether the complainant has a *plain, adequate* and *complete remedy in an action at law* and that if he has not such a remedy, no circumstances as to possession, whether by a public service corporation or by an individual, can deprive him of his right to maintain his cause in equity.

We refuse to turn away from the learning of the past and an acceptance of the purpose of the creation of courts in equity in order that we may get into the exclusive company of appellees when they say at page 16 of their first brief:

> "hence it is not necessarily true that there must be an equitable remedy because there is none at law".

Defendants claim that they did not waive objection to jurisdiction in equity (appellees' first brief page 39). This position is based upon what complainants deem an erroneous view of the law as to what constitutes a waiver. At page 7, same brief, defendants state that

> "there was no joinder in appeal to equitable jurisdiction and hence no waiver of objection to jurisdiction".

It is apparent from appellees' briefs that they rely upon the fact that they

> "do not elect to treat the complaint as one in equity"

and that they

> "have not joined issue in equity"

upon the theory that the defenses made in the answers might be interposed in an action at law. Complainants deem it sufficient to say that the suits were pending in equity and issue was joined there without objection. Complainants elected the forum and defendants did not object.

Defendants assert on page 2 of the same brief that they answered the original complaints

> "but did not seek to have the title of complainants quieted *but* merely alleged possession and *set up some equitable defenses*".

Defendants knew that the suits were pending in equity and that the object of bringing them into court was to determine in equity the rights of the parties in and to the property in controversy. As was said in Converse v. Michigan Dairy Co., 45 Fed. 20:

> "These defendants thereafter knowing as they must have done that the object of bringing them in at all was in order that their claims should be cut off by the decree, and not having raised the objection of multifariousness until now come within the scope of the doctrine repeatedly declared by the Supreme Court that if the matters were of equitable cognizance the objection must be raised in limine and if not then made should not be entertained."

Moreover, it appears at the bottom of page 20 of the transcript that defendants considered their answers as sufficient in equity to constitute a cause of action to quiet title by defendants, at least on October 30, 1914, at a time when to do so served their purpose in the matter then before the court, seven months before they decided to object to jurisdiction in equity or rather before they declared to complainants that they had intention of objecting.

Appellees state in their first brief that appellants did not object to submission of the question of jurisdiction on the motions and refer to a stipulation in the transcript at page 70. It will be recalled that the amended bills contained an allegation of possession by the Southern Pacific Company, that the defendants, upon filing of the amended bills, moved to dismiss; that the complainants, at the hearing of the motions to dismiss, filed an amendment to the amended bills (Tr. p. 17). The stipulation at page 70 of the transcript was given at a time when the motions to dismiss had already been heard, and in the language of counsel for appellees, upon oral argument

> "so that it would not be necessary to make a new motion to transfer, and a new motion to dismiss".

Such was the purpose of the request for, and the giving of the stipulation. As to how strenuously complainants objected to the motions to dismiss can be gathered from that portion of the proceedings before his Honor Judge Van Fleet, read at the oral argument, which in substance is set out in appellants' opening brief at page 81.

In addition to the objections being urged, as is shown in the foregoing, we direct attention to portions of the affidavit of Mr. Wm. H. Devlin—pages 77 to 78 of transcript. There it is shown that complainants ignored the motion to dismiss by moving to have the suits set for trial at the calling of the July calendar, 1915, contemporaneously with the filing of the motions, but that they were opposed by defendants upon the ground, as is shown in the same affidavit,

> "that the cause is not at issue, as no answer to the amended complaint has ever been filed".

The affidavit shows further, that when the trial calendar was called, in November, 1915, the complainants again insisted upon the motions to dismiss being ignored, and that the suits be set for trial (Tr. top of page 78). So far as showing that the complainants did not object to the motions being considered as affecting the status of the suits, the records disclose that they were objecting at every opportunity. It cannot be claimed that the stipulation, referred to, was given for the purpose for which counsel for defendants now seek to use it. The stipulation was given after the hearing on the motions to dismiss the amended bills, as a favor to defendants, for the purpose of saving, as

counsel stated upon oral argument, the unnecessary task of writing new motions, the argument on which had already been heard—and for no other purpose. Defendants were in nowise misled by the stipulation. It will not be permitted that a stipulation, given under such circumstances, may now be construed as a waiver of all the objections which the complainants were consistently urging against the procedure adopted by the defendants. It was becoming of and the professional duty of complainants to give the stipulation that unnecessary expense and encumbering of the record might be avoided.

If this court deems that the circumstances show a willful disregard of any stipulation given by appellants, we are free to confess that appellants consider that they thereby will have taken themselves without the pale of protection of this court. Appellants know of no authority which detracts from the effect of stipulations as announced in Levi v. Evans, 57 Fed. 681, cited and quoted in Pacific Coal and Transportation Company v. Pioneer Mining Co., 205 Fed. 577, and subscribe their full support to the following language used in that case:

> "If additional and amended pleadings, exhibiting causes of action of an equitable nature, could not properly be filed in an action at law, all objection to such course of procedure was expressly waived by the appellant, and he voluntarily appeared to these suits, pursuant to a stipulation entered into by him with the appellees for a valuable consideration. Good faith and fair dealing would now preclude the appellant from profiting by his objection. But, if there had been no waiver, the objection came too late. If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object

that the plaintiff has a plain and adequate remedy at law. I Daniell, Ch. Pr. (4th Amer. Ed.) p. 555; Reynes v. Dummont, 130 U. S. 395, 9 Sup. Ct. Rep. 486; New Orleans v. Morris, 105 U. S. 600. Good faith and an early assertion of rights are as essential on the part of the defendant as of the complainant. Brown v. Iron Co., 134 U. S. 530; 10 Sup. Ct. Rep. 604."

IF THE DEFENDANTS HAD CARRIED OUT THEIR STIPULATIONS WITH THE COMPLAINANTS, THEY WOULD HAVE COMPLIED WITH NEW EQUITY RULE 32 AND THERE WOULD NEVER HAVE ARISEN THE QUESTION OF DECREES PRO CONFESSO, BUT HAVING SOUGHT DELAY THROUGH DISREGARD OF STIPULATIONS AND THE RULES OF COURT, THEY CANNOT COME NOW AND ASK THAT THEY BE RELIEVED FROM THE CONSEQUENCES OF THEIR CONDUCT.

Complainants exhausted every recourse open to them in their effort to obtain a trial upon the merits. They received stipulations, and unequivocal agreements that defendants would not object to a trial of the suits, as at issue. The court on March 1, 1915 ordered such a trial, yet appellants are here on a decree of dismissal before trial.

Appellants' delay in entering decrees *pro confesso* was due alone to their effort, as appears from the record, to obtain a trial upon the merits. They had decrees *pro confesso* entered only when their last hope of obtaining a trial upon the merits vanished. Appellants ignored the motion to dismiss as affecting the status of the suits as is evidenced by their insistence upon the cases being set for trial at every calling of

the calendar after the motions were filed. Appellants moved, at every possible opportunity, for trial, urging upon the court to order the cases to trial. It was not the duty of appellants to insist upon the making of an order that the answers originally filed stand, but, since the defendants did not move for such an order under Rule 32, it was the right of appellants to do so and such was the apparent purpose of appellants' motions to set the causes for trial. Appellants were not obligated to demand decrees *pro confesso* so long as they might hope for a trial on the merits and we think that this court will encourage the exhaustion of all reasonable means for obtaining a trial upon the merits in preference to decrees *pro confesso* and that complainants' efforts to obtain meritorious trials will not be construed against them as defeating their right to decrees *pro confesso* when all prospect of trial upon the merits was taken from them. Counsel for defendants in oral argument stated the purpose of the stipulation at page 70 of the transcript to be that defendants might be relieved of the necessity of writing new motions. The motion to dismiss had already been heard, as the stipulation shows. The stipulation was given for the purpose stated by counsel and now counsel seeks to construe the stipulation as depriving complainants of every legal right which they urged upon the hearing of the motion to dismiss. Surely this court will not permit that stipulation to be so misapplied. The wording of the stipulation is plain. The purpose of the giving of it comes out of the mouth of the defendants themselves in the foregoing statement of their counsel and it will certainly appear plain to this court that complainants

would not give a stipulation within a week of the hearing of the motion to dismiss, which in effect would waive all the legal objections which they had urged upon the hearing of the motion; the stipulation given means simply that "since you have made your motion to dismiss and the motion has been heard, we shall not insist upon your rewriting your motions, nor upon the record being encumbered with new motions but we are willing that the motion which has been filed shall apply to the amendment which we filed upon the hearing of the motion".

The record shows that the amendment was filed at the time of hearing of the motions and in response to the motions for further and better particulars and not as an admission of any weakness in the amended bills whatever (see first paragraph of amendment, Tr. p. 17).

Complainants ignored the motions to dismiss as far as possible, and urged upon the court the setting of the causes for trial upon the theory that the court could order under Rule 32 the answers to stand, since no new answers were in. The court refused to set the causes for trial—or to consider the original answers as standing. Defendants had contended for the ruling which the court made. It consequently appears plain that both the court and counsel for defendants looked upon the answers originally filed as no longer a part of the records. Complainants thereupon—after the court's opinion showing that the court did not consider the answers in the record for any purpose—had the right to accept defendants' view and the court's view.

There being no answers in the record at all, and the court refusing to order the original answers to stand, complainants were entitled under Rule 32 to their decrees *pro confesso*.

Moreover, they were entitled at all times to such decrees under the rules because it was the duty of the defendants to obtain an order from the court that the original answers should stand as the answers to the amended bills if they wished the original answers so to stand. It is apparent, however, that the defendants did not so wish but wished to object upon the ground that the amended bills did not state facts sufficient to constitute valid causes of action in equity, for the reason that they disclosed a remedy at law, namely, in damages. The right to so object did not exist in the defendants at that time.

Sanction given to the conduct of the defendants as evidenced by the record in the pending cases will not be inspiring to sympathy with the spirit of the new rules in equity. That conduct is contrary, as we think, to every intendment of those rules. It is violative of every thought and effort of the profession to better old conditions which made possible such delays as the complainants in these cases have suffered and which led to the adoption of the new equity rules. If such disregard of the rules and of stipulations should receive the sanction of appellate courts, what efficacy is there in the rules and how can the profession take encourage-

ment for the fulfillment of the promise of speedy determination of causes which the new procedure adopted by the new rules holds out? Experienced counsel for defendants cannot claim ignorance of the rules any more than of the effect of the stipulations given.

We could not be easily convinced that counsel for defendants do not know that, in view of the authorities, the amended bills of complaint in these suits contain facts sufficient to constitute valid causes of action in equity; that, by answering to the merits, defendants submitted to jurisdiction; that a court in equity should have compelled them to comply with their stipulations.

There is no escaping the conclusion that the successive steps were designedly taken by the defendants at a time when longest delay would be assured. Note the lapse of time before the filing of the notice of motion to transfer at Sacramento. The motion was noticed for hearing on the day set for trial, notwithstanding months had intervened since the suits were brought to issue.

Except for denial of complainants' rights to trial, the cases would now be here after trial on the merits.

Many reasons exist why the defendants should not wish to try the suits upon their merits. The record discloses possession in the defendant Southern Pacific Company and a clear lack of title, as will be later summarized.

If defendants can knowingly make "mistakes of law" and may take the advantage of delays occasioned thereby in the face of certain reversal with the chance of a reversal that merely remands the cases, the whole

purpose of the new equity rules, in speeding causes and eliminating delay, will be defeated.

Appellants submit their claim to have the wrongs which they have suffered effectually rectified by final decrees.

FINAL DECREES WILL NOT DEPRIVE DEFENDANTS OF ANY SUBSTANTIAL RIGHT.

The record now shows that the holding of the defendant companies as claimed by them, at all times has been limited to an estate for years, expiring on the 28th day of June, 1911.

It is alleged in the answers that the Central Pacific Railroad Company of California was a corporation organized under the laws of the State of California, and that it entered upon the property described in the bills of complaint in the year 1863. It was admitted at the oral argument that said Central Pacific Railroad Company of California was organized on the 28th day of June 1861, to exist for a term of fifty years. By reference to the California Statutes of 1861 it will be seen that the rights of the Central Pacific Railroad Company of California and its successors in interest, in and to the property, terminated on the 28th day of June, 1911. Said section will be presently quoted.

In the opening brief (pages 62 et seq.) appellants argue that it cannot be the law that, where a railroad company enters upon land under conditions which fix a limitation of time upon the right of the company to hold, a party owning through mesne conveyances from the

original owner has not the same right to proceed upon arrival of the time limitation as the owner had at the time of the original entry.

Since the hearing in this matter upon oral argument, appellants' position in that regard has been confirmed in a case reported in 22 Cal. App. Dec. 668, E. San Mateo Land Company v. Southern Pacific Railroad Company, the first head note of which is as follows:

> "A deed reciting that for and in consideration of encouraging and promoting the construction of a railroad, and for other considerations, the grantor conveyed the land therein described to a railroad company and its successors 'during the legal existence of said company, solely upon the following conditions (here follow certain conditions) * * *; and upon the breach * * * of any of the aforesaid conditions, this grant shall become void, and the estate thereby conveyed * * * shall cease and determine, and the said land shall absolutely revert to the party of the first part (grantor) his heirs or assigns in the fee simple * * * and shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, notwithstanding anything herein contained to the contrary,' does not show an intention of the grantor to irrevocably dedicate the land to railroad use upon a condition subsequent, but shows an intention to limit the duration of the grant to the period of legal existence of the company."

The provisions incorporated in the deed under consideration in the foregoing case, in the view of appellants, must be read into the rights of the Central Pacific Railroad Company of California and its successors in interest in and to the land described in the amended bills of complaint herein by reason of the fol-

lowing provision of the statute under which said railroad company was incorporated:

> "Any railroad company, organized under the provisions of this act, or any railroad company now organized under any law of this State, which shall accept the provisions of this act, as herein provided, is hereby authorized to enter upon any land for the purpose of surveying the line of its proposed railroad, the company being responsible for any damage occasioned by such entry; and such company is also authorized to acquire, purchase, and hold, any real estate, or any right, title, or interest, therein, which may be necessary, or proper, for the purpose of the construction, or maintenance, of the track, or tracks, water-stations, depots, machine, or work shops, turn-tables, or any other building, or structure, necessary for such railroad; but such company shall not hold such real estate, or any right, title, or interest, therein, acquired, or used solely, or mainly, for the construction, or maintenance of the track, or tracks, of said railroad, beyond the time of the legal existence of said company, nor after the location of said track, or tracks, has been changed therefrom, nor after the said company shall have failed, or ceased, to use the same, for the maintenance of such track, for the space of five years continuously; but in each of such cases, the said real estate, and all the right, title, and interest, therein, shall revert to the person or persons, and his, or their, assigns, from whom the same was acquired by said company." Cal. Statutes 1861, p. 618, in effect May 20, 1861.

The statute is no doubt referable to the fifty year limitation on the term of existence of corporations as fixed by the State Constitution.

Appellants did not institute the pending suits, however, in reliance upon the foregoing quoted statute; yet, it appears to them that, in the absence of other

ground, they would be entitled to rely upon said statute.

Whether appellees had in mind the foregoing statute when the amended answer was filed in which it was alleged that the entry of the Central Pacific Railroad Company of California was "under, by and with the consent of the predecessors in interest of plaintiff" (Tr. p. 99), the record does not disclose, nor does it disclose whether appellees had such statute in mind when, though under order of court to set out under what instrument, if any, said Central Pacific Railroad Company of California and its successors in interest, including the present defendants, have held possession of said property, they failed to set out, in their supposed compliance with said order, any instrument at all. Their failure to set out any instrument in complying with the order of court can be given but one proper construction and that is that they set out their strongest claim to the property and in the face of the claim set out and of the foregoing statute, they bring themselves under the rule laid down in Klenk v. Bryn, 143 Fed. 1010, where it is said that

> "General denials which are inconsistent with facts affirmatively alleged are not entitled to consideration."

The foregoing case involved questions of title where matters affirmatively appeared in the pleading which negatived a general allegation of ownership.

The pleadings taken together with the whole record now before this court show that upon the merits of the

controversy, independent of other considerations herein urged, appellants are entitled to final decrees and they petition this court for such, upon the record, pleadings and admissions given and made.

At the oral argument counsel for appellees said of appellants' failure to amend and their election to stand upon their amended bills that "they have had their day in court; it is all over upon the merits". Appellants admit that if the decree should be affirmed it is "all over" with them in equity for they made their election.

Appellants take a like position with reference to appellees and say that the defendants elected to stand upon the insufficiency of the amended bills in equity and to not file a new or supplemental answer to the amended bills as provided by Rule 32. Appellants say that if they have had their day in court so have the defendants and that if the amended bills do state good causes of action in equity or if defendants waived the right to object to jurisdiction in equity, then defendants are in default and "it is all over".

Both sides have made their election and stand upon the correctness of their positions in law. They submit the matter as to in whose favor the decrees shall be made herein.

Appellees nowhere question the authorities in appellants' opening brief at pages 128-143, but stand upon lack of jurisdiction over the suits, and there consequently being no default. Appellees do not deny but that this court should make final decrees if the orders

for decrees *pro confesso* were erroneously set aside. If there be jurisdiction or waiver, there must be a default under Rule 32.

THIS COURT IN EQUITY CAN AND WILL MAKE DECREES WHICH WILL GIVE APPROPRIATE RELIEF.

Appellants deem it not out of place, however, to set out an idea as to the sort of decrees which the court may make. Appellants are entitled to final decrees in law and no ground exists in law or equity why decrees herein should not be final, particularly since the record discloses, viewed from the pleadings, admissions and conduct of the defendants, that the defendants have in themselves no substantial rights in the property involved. Ordinarily, a decree, quieting the title to the whole property and an order for a writ of possession as to the whole of the property, would follow, in order that the whole controversy may be disposed of in these suits. Such was the purpose of Section 738, Cal. Code of Civil Procedure; in Landregan v. Peppin, 94 Cal. 466, it is stated

> "He (the plaintiff) has the right to secure all the relief in one action and this was the sole object of the provision."

Such, too, has been the uniform policy of the federal courts in equity, authorities to which point are given in appellants' opening brief. There is, however, upon a portion of the property involved a railroad main track, used by the Southern Pacific Company, defendant. Appellants are of the opinion that, notwithstanding the record, appellees should be permitted to condemn an

easement of necessary width for operation of their main line over the land, and that this court should grant to them a reasonable time within which to make arrangements with complainants for a strip of land of that character or to proceed in condemnation for that purpose.

In Richards v. Buffalo et al., R. R. Co., 137 Pa. St. 534, cited in appellants' opening brief, page 71, and concluding at the top of page 73, it was ordered that execution be stayed for four months, in order that defendant might proceed to condemn and acquire a right of way according to law.

Beyond these suggestions appellants will not suggest as to the form of decree, but, they do wish to call the attention of the court to the fact that the pending suits were instituted in the summer of 1914, and that defendants are in possession of this valuable property and by dilatory means have succeeded in keeping themselves in possession for almost two years; if the allegation of the answers be taken as true and construed with the whole record, including all admissions given and made, the rights of defendants to hold expired in 1913. Surely, the fact that the suits are before this court, without complainants having had a trial, cannot be attributed to any lack of diligence in pressing for a trial by complainants. Appellants petition of this court as speedy and as full relief as this court can give; they have been grievously wronged, and their hope of speedy relief is in decrees in this court and not in a remanding of the suits. *They submit the record as to whether they have reason to earnestly petition this court for final decrees.*

STATEMENTS MADE UPON ORAL ARGUMENT WHICH APPELLANTS WISH THIS COURT TO HAVE IN MIND.

COUNSEL FOR APPELLEES.

First.

> "Now with this motion before the Court we pleaded that the complaint with the amendment added did not state a valid cause in equity. Why? For the reason that the property now appeared to to be in the possession of the Southern Pacific Company—all of it. Such was the averment. If that be the case, then the property was not unoccupied and waste and uncultivated and therefore no valid cause of equity could be set up against the Central Pacific Railway Company, one of the defendants. Again, if the property is in the possession of the defendant then there is a complete bar in equity to an action to quiet title upon the equity side because then the remedy is upon the law side if the complainant claims to be an owner of the property and the defendant is in possession as alleged in this bill."

Second.

After setting out appellees' view of the remedy open to owners who have permitted their land to be taken by a railroad, Mr. Devlin said:

> "And his only remedy is to sue in damages and that belongs to the owner of the property at the time of the taking and it does not belong to the owner of the property subsequently. Now that is the rule and there is no question about it. The authorities in Judge Van Fleet's Opinion hold so."

(Since the argument, the District Court of Appeal of California has held otherwise in East San Mateo Land Co. v. S. P. Co., heretofore cited in this brief.)

Third.

"As we understand the law, the amended complaint was filed by counsel for complainant in response to a suggestion by the Court that such an amended bill was proper; the complainant having complied, that necessarily waived everything that occurred before that time. There is not any answer to the amended bill because we have not got to that point as yet."

(A clear showing of violation of Equity Rule 32.)

"But the action could be transferred to the law side and it ought to appear that the complaint stated an action at law."

(The court will readily see that in a suit to quiet title, a complainant would make no attempt to state an action at law in damages, though the bill might clearly show a justiciable cause.)

By Counsel for Appellants.

First.

"Now that your Honors may get the chain, alleged in part, to title of the defendants we start with the old Central Pacific Railroad Company of California, and if I am not correct, counsel will correct me. That corporation was organized under the laws of the State of California, June 28, 1861 for a term of fifty years, to exist. The Central Pacific Railroad Company of California was later consolidated with the Central Pacific Railroad Company, leaving off the 'of California'. That corporation was organized in August, 1870 for fifty years and the rights of the last named corporation have passed to the present day Central Pacific Railway Company, a Utah corporation."

Second.

"I represented all of the complainants in the suits below and Mr. Devlin, Devlin & Devlin and Mr. Foulds' office represented the defendants."

Third.

"The defenses set up are identical in all of the answers. Our time to appeal will expire in June and we would like to know the action of the court that we can take proper action regarding the other cases.

Judge GILBERT. You have no stipulation that the decisions in the other cases shall abide by the decision in this case.

Mr. WHITE. I have received none. I have an order of the court below of consolidation for the purpose of appeal, but I have no stipulation."

CONSOLIDATION.

It is said in appellees' last brief that

"It was practically conceded on oral argument that the attempted consolidation was abortive."

The foregoing quotation (third) from the oral argument shows what was said in that connection. Appellants will, if this court finds it inconvenient to decide this appeal before June 3, 1916, file in the clerk's office of this court a transcript of the proceedings in each of the fifteen remaining suits, however costly and laborious the task. This will be done as was said by the United States Supreme Court in United States v. Baltimore etc., 220 U. S. 94; 55 L. ed. 385, cited in appellants' opening brief at page 146,

"out of abundant caution".

Appellants have faith, however, in the sufficiency of the authorities cited in their opening brief, pages 144-150, as warranting this court in passing upon all the cases upon this record, particularly in view of the following admitted condition:

> "There are in addition to the above entitled suit, fifteen similar suits and there are similar decrees in each of said cases" (appellees' first brief page 1).

The trial court granted a consolidation of the fifteen other cases with the case by which this appeal is entitled (appellees' first brief page 42); and in the opinion of the trial court it is said, at page 25 of transcript, that the several actions are of a *precisely similar character,* and as is said in appellants' opening brief, page 2

> "The defendants answered the original bills and set up precisely the same defenses in all of the suits."

It appears from the record that various papers filed in one suit were made applicable to all suits alike, as was done, for instance, in the case of the opinion of the court below. Counsel for both sides have remained the same throughout the proceedings in all suits and the record shows that many papers filed in one suit, were made applicable to all; in the praecipes of both parties, upon this appeal, papers from the files of the different suits were designated. The similarity of pleadings and of the general character of the suits and questions involved were admitted upon oral argument.

The order of consolidation appears to appellants to have been proper since the condition of the record was clearly within the scope of cases contemplated by Re-

vised Statute Section 921, providing for the consolidation of causes of a like nature or relative to the same question for the purpose of saving expense to the parties and the time of the court.

A stipulation of parties, it seems to appellants, would only clear the way for an order of court. By the order of consolidation, so much of the life of each case was imparted into the principal case that subsequent proceedings affecting the principal case carry with them all cases affected by the order of consolidation.

Appellants submit the effect of the order of consolidation upon the authorities cited in their opening brief, pages 144-150, and pray for such and as full relief as this court may deem them entitled.

Dated, San Francisco,
April 24, 1916.

Respectfully submitted,

BURRELL G. WHITE,
Attorney and Solicitor
for Appellants and Complainants.

EDWARD ELLIOTT,
ROY S. BARTLETT,
Of Counsel.

Case No. 2731.

United States

Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error

vs.

TERRITORY OF ALASKA,
Defendant in Error,

Brief of Plaintiff in Error

Upon Writ of Error to The United States District Court of The District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
Counsel for Plaintiff in Error.

FILED
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STATEMENT OF FACTS.

This is an action brought to recover taxes claimed to be due under an act of the Territorial Legislature. It is a test case in that the payment of taxes by others similarly situated is delayed pending a decision herein.

In June, 1906, Congress passed an act relating to the fisheries of Alaska, the first section of which reads as follows:

> "That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the territory known as Alaska, ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty seven, or in any of the waters of Alaska over which the United States has jurisdiction, shall, in lieu of all other license fees and taxes thereof and thereon, pay license taxes on their said business and output as follows: Canned salmon, four cents per case; pickled salmon, ten cents per barrel; sale salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton. The payment and collection of such license taxes shall be under and in accordance with the provisions of the act of March third, eighteen hundred and

ninety-nine, entitled " 'An act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for the district,' " and amendments thereto."

In August, 1912, Congress passed the Organic Act, providing among other things for a Territorial Legislature. This act reads as follows: (The pertinent portions are in italics.)

(PUBLIC—NO. 334.)

(H. R. 38.)

An Act to create a legislature in the Territory of Alaska, to confer legislative power thereon, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

ALASKA TERRITORY ORGANIZED.—That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be organized and administered as provided by said laws.

SEC. 2. CAPITAL AT JUNEAU.—That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there.

SEC. 3. CONSTITUTION AND LAWS OF UNITED

STATES EXTENDED.—*That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to bur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.* And the legislature shall pass no law de-

priving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.

SEC. 4. THE LEGISLATURE.—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and house of representatives. The senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress, each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the senate shall be four years: *Provided*, That immediately after they shall be assembled in consequence of the first election they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so that one member of the senate shall, after the first election, be elected bienially at the regular election from each division. The house of representatives shall consist of sixteen members, four from each of the four judicial divisions into which Alaska is now divided by Act of Congress. The term of office of each representative shall be for two years and each

representative shall possess the same qualifications as are prescribed for members of the senate and the persons receiving the highest number of legal votes in each judicial division cast in said election for senator or representative shall be deemed and declared elected to such office: *Provided*, That in the event of a tie vote the candidates thus affected shall settle the question by lot. In case of a vacancy in either branch of the legislature the governor shall order an election to fill such vacancy, giving due and proper notice thereof. That each member of the legislature shall be paid by the United States the sum of fifteen dollars per day for each day's attendance while the legislature is in session, and mileage, in addition, at the rate of fifteen cents per mile for each mile from his home to the capital and return by the nearest traveled route.

SEC. 5. ELECTION OF MEMBERS OF THE LEGISLATURE.—That the first election for members of the Legislature of Alaska shall be held on the Tuesday next after the first Monday in November, nineteen hundred and twelve, and all subsequent elctions for the election of such members shall be held on the Tuesday next after the first Monday in November biennially thereafter; that the qualifications of electors, the regulations governing the creation of voting precincts, the appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the forms of ballots, the register of votes, the challenging of voters, and the

returns and the canvass of the returns of the result of all such elections for members of the legislature shall be the same as those prescribed in the Act of Congress entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of eleciton to each member elected to the said legislature; and all the penal provisions contained in section fifteen of the said Act shall apply to elections for members of the legislature as fully as they now apply to elections for Delegate from Alaska to the House of Representatives.

SEC. 6. CONVENING AND SESSIONS OF LEGISLATURE.—*That the Legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years* unless again convened in extraordinary session by a proclamation of the governor, which shall set forth the object thereof and give at least thirty days' written notice to each member of said legislature, and in such case shall not con-

tinue in session longer than fifteen days. The governor of Alaska is hereby authorized to convene the legislature in extraordinary session for a period not exceeding fifteen days when requested to do so by the President of the Unitd States, or when any public danger or necessity may require it.

SEC. 7. ORGANIZATION OF THE LEGISLATURE.—That when the legislature shall convene under the law, the senate and house of representatives shall each organize by the election of one of their number as presiding officer, who shall be designated in the case of the senate as "president of the senate" and in the case of the house of representatives as "speaker of the house of representatives," and by the election by each body of the subordinate offices provided for in section eighteen hundred and sixty-one of the United States Revised Statutes of eighteen hundred and seventy-eight, and each of said subordinate officers shall receive the compensation provided in that section: *Provided*, That no person shall be employed for whom salary, wages, or compensation is not provided in the appropriation by Congress.

SEC. 8. ENACTING CLAUSE—SUBJECT OF ACT.—That the enacting clause of all laws passed by the legislature shall be "Be it enacted by the Legislature of the Territory of Alaska." No law shall embrace more than one subject, which shall be expressed in its title.

SEC. 9. LEGISLATIVE POWER.—LIMITATIONS.—*The legislative power of the Territory shall extend*

to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges, but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business

shall be in the Territory of Alaska; no divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have resided in the Territory for two years next preceding the application, which residence and all causes for divroce shall be determined by the court upon evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under such regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government, nor shall the Government of the Territory of Alaska or any political or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the

name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness: *Provided*, That all authorized indebtedness shall be paid in the order of its creation, *all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof.* No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year; *Provided*, That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for

a county form of government therein shall have any force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislation in said Territory inconsistent with the provisions of this section shall be null and void: *Provided further*, That nothing herein contained shall be held to abridge the right of the legislature to modify the qualifications of electors by extending the elective franchise to women.

SEC. 10. RULES, QUORUM, AND MAJORITY.—That the senate and house of representatives shall each choose its own officers, determine the rules of its own proceedings not inconsistent with this Act, and keep a journal of its proceedings; that the ayes and noes of the members of either house on any question shall, at the request of one-fifth of the members present, be entered upon the journal; that a majority of the members to which each house is entitled shall constitute a quorum of such house for the conduct of business, of which quorum a majority vote shall suffice; that a smaller number than a quorum may adjourn from day to day and compel the attendance of absent members, in such manner and under such penalties as each house may provide; that for the purpose of ascertaining whether there is a quorum present the presiding officer shall count and report the actual number of members present.

SEC. 11. LEGISLATOR SHALL NOT HOLD OTHER OFFICE.—That no member of the legislature shall

hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the legislature or shall hold any office under the government of said Territory.

SEC. 12. EXEMPTIONS OF LEGISLATORS. — That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in going to and returning from the same: *Provided*, That such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way.

SEC. 13. PASSAGE OF LAWS.—That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or

in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration.

SEC. 14. THE VETO POWER.—That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the governor does not approve such bill, he may return it, with his objections, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become a law. That if the governor neither signs nor vetoes a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law with-

out his signature, unless the legislature adjourns sine die prior to the expiration of such three days. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law.

SEC. 15. PAYMENT OF LEGISLATIVE EXPENSES.—That their shall be annually appropriated by Congress a sum sufficient to pay the salaries of members and authorized employees of the Legislature of Alaska, the printing of the laws, and other incidental expenses thereof; the said sums shall be disbursed by the Governor of Alaska, under sole instructions from the Secretary of the Treasury, and he shall account quarterly to the Secretary for the manner in which the said funds shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by the governor or by the legislature for objects not authorized by the Acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

SEC. 16. LAWS TRANSMITTED TO PRESIDENT AND PRINTED.—That the Governor of Alaska shall, within ninety days after the close of each session of the Legislature of the Territory of Alaska, transmit a correct copy of all the laws and resolutions passed by the said legislature, certified to by the secretary of the Territory, with the seal of the Territory attach-

ed; one copy to the President of the United States; and one to the Secretary of State of the United States; and the legislature shall make provisions for printing the session laws and resolutions within ninety days after the close of each session and for their distribution to public officials and sale to the people of the Territory.

SEC. 17. ELECTION OF DELEGATES.—That after the year nineteen hundred and twelve the election for Delegate from the Territory of Alaska, provided by "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, shall be held on the Tuesday after the first Monday in November, in the year nineteen hundred and fourteen, and every second year thereafter on the said Tuesday next after the first Monday in November, and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein: *Provided*, That the time for holding an election in said Territory for Delegate in Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by an act passed by the Legislature of the Territory of Alaska: *Provided further*, That when such election is held it shall be governed in every res-

pect by the laws passed by Congress governing such election.

SEC. 18. CREATING RAILROAD COMMISSION.—That an officer of the Engineer Corps of the United States Army, a geologist in charge of the Alaska surveys, an officer in the Engineer Corps of the United States Navy, and a civil engineer who has had practical experience in railroad construction and has not been connected with any railroad enterprise in said Territory be appointed by the President as a commissions hereby authorized and instructed to conduct an examination into the transportation question in the Territory of Alaska; to examine railroad routes from the seaboard to the coal fields and to the interior and navigable waterways; to secure surveys and other information with respect to railroads, including cost of construction and operation; to obtain information in respect to the coal fields and their proximity to railroad routes; and to make report of the facts to Congress on or before the first day of December, nineteen hundred and twelve, or as soon thereafter as may be practicable, together with their conclusions and recommendations in respect to the best and most available routes for railroads in Alaska which will develop the country and the resources thereof for the use of the people of the United States: *Provided further*, That the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated to defray the

expenses of said commission.

SEC. 19. That the Committee on Territories of the Senate and the Committee on Territories of the House of Representatives are hereby authorized, empowered, and directed to jointly codify, compile, publish, and annotate all the laws of the United States applicable to the Territory of Alaska, and said committees are jointly authorized to employ such assistance as may be necessary for that purpose; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to cover the expenses of said work, which shall be paid upon vouchers properly signed and approved by the chairman of said committees.

SEC. 20. LAWS SHALL BE SUBMITTED TO CONGRESS.—That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect.

Approved, August 24, 1912.

In the year 1913, the Territorial Legislature passed a revenue bill, which reads as follows: (The pertinent portions are in italics.)

CHAPTER 52.

(H. B. No. 96.)

AN ACT to establish a system of taxation, Create Revenue, and Provide for Collection Thereof

for the Territory of Alaska, and for other Purposes.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. *That any person or persons, corporation, or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain licese so to do from the district court or subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to-wit:*

Fisheries: Salmon canneries, seven cents per case on sock-eye and king salmon; one half cent a case on hump-back, cohoe, or chum salmon.

Cold Storage Fish Plants: Doing a business of one hundred thousand dollars per annum, five hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, three hundred and seventy five dollars per annum; doing a business of fifty thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars per annum, fifty dollars per annum; doing a business of under ten thousand dollars per annum, twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum. The annual business of this section shall be considered the amount

paid per annum for the product.

Laundries doing a business of more than five thousand dollars per annum, twenty-five dollars.

Meat Markets: Doing a business of more than five thousand dollars per annum and less than ten thousand dollars per annum, twenty-five dollars per annum; doing a business of more than ten thousand dollars per annum, fifty dollars per annum; doing a business of more than fifty thousand dollars per annum, seventy-five dollars per annum; doing a business of more than seventy-five thousand dollars per annum, three hundred and seventy-five dollars per annum; doing a business of more than one hundred thousand dollars per annum, five hundred dollars per annum.

Furs: One-half of one per cent. of the gross value of any furs, the product of Alaska, exported from the Territory and it shall be unlawful and punishable under this act for any person to ship from the Territory of Alaska any furs without having first paid for and obtained a license permit as herein provided; and no custom officer shall issue a manifest for nor postmaster receipt for mailing any furs unless the shipper thereof shall present a certificate for this license fee signed by the clerk of the district court of the division in which the furs were shipped.

Telephone Companies: Doing a business of more than twenty-four hundred dollars per annum, one-half of one per cent. of the gross volume of busi-

ness per annum over and above the sum of twenty-four hundred dollars.

Transient and Itinerant Merchants, two hundred dollars per annum.

Mining: One-half of one per cent. on net income over and above five thousand dollars per annum.

Insurance Companies: A tax shall be imposed on all premiums payable on risks in the Territory of Alaska of one per cent. of the amount of such premiums.

1. In the case of such insurance premiums being paid to companies not licensed to do business in the Territory of Alaska, mutual's or Lloyd's, such tax shall be payable by the insured;

2. In case of premiums paid to companies licensed and doing business in the Territory of Alaska; such tax shall be payable by the company receiving the same.

Express Companies: Express companies to pay one per cent. of the business done by said express companies in the Territory of Alaska per annum.

Lighterage Companies: Ten cents per ton on freight handled or lightered.

Public Messengers, twenty-five dollars per annum.

Public Scavengers, fifty dollars per annum.

Lodging Houses, ten dollars per annum.

Reindeer owned by white men, twenty-five cents per head per annum.

Fishing Vessels: Fishing vessels propelled by mechanical power of over thirty tons net and plying or fishing in the waters of Alaska, one dollar per ton per annum on net tonnage, custom house measurement, of each vessel.

Transportation: On every ton of freight shipped into or from the Territory of Alaska by any transportation company or steamship line, per annum, payable through the custom house at time of entry to be paid into the Territorial Treasury, ten cents per ton, except return shipments of casks, tanks, kegs, carboys or other receptacles used in the shipment of liquids.

Sec. 2. That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon: Provided, That the clerk of said court in each division thereof shall give bond or bonds in such amount as the Treasurer of the Territory may require and in such form as the governor may approve, the premium on said bond to be paid from any funds in the Treasury of the Territory of Alaska not otherwise appropriated, and all moneys received for licenses

by any clerk of a district court in this Territory under this act, except the moneys derived from fisheries, (one-half of which amount shall be paid by the clerk into the Territorial Treasury to be made available for the propagation and preservation of salmon and other fish in the Territory of Alaska and to be expended under the direction of the United States Bureau of Fisheries) shall, except as otherwise provided by law, be covered into the Treasury of the Territory of Alaska, under such rules and regulations as the Territorial Treasurer may prescribe.

Sec. 3. *That any person, corporation or company doing or attempting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; Provided, That each day business is done or attempted to be done in violation of this act shall constitute a separate and distinct offense; Provided further, That in all prosecutions under this act the costs shall be assessed against any person, firm or corporation convicted of violations hereof, in addition to the fine or penalty imposed, and for failure to pay such fine and costs such person, firm*

or corporation may be imprisoned, in the discretion of the court, at the rate of one day for every two dollars of said fine and costs; Provided further, however, that in the event of any person, firm, or corporation shall fail to pay the license required by the provisions of this act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or tax required by the provisions of this act, judgment may be entered against such firm, person, or corporation and process shall be issued for the enforcement of the collection of said judgment and in the same manner as judgments in civil proceedings.

Sec. 4. All United States marshals and their deputies as ex-officio constables, United States fish commissioners and their deputies, in the Territory of Alaska are hereby made license inspectors under this act and shall have power and authority to go upon premises and examine the books, papers, bills of lading, and all other documents bearing upon any matters provided for in this act, of any person, firm, or corporation whom they have reasonable grounds to believe is evading this act; and if any United States Marshal, or his deputy, United States fish commissioner, or his deputy, as ex-officio constables shall find any person, firm, or corporation violating this act, or any provision thereof, it shall be the duty of said deputy marshal to go before a United States commissioner, file a complaint in writing

charging the person, firm or corporation so violating this act with a misdemeanor, as provided herein, and upon obtaining a warrant upon said complaint to arrest the said person, firm, or corporation and take him or them before the United States commissioner issuing the warrant, for trial.

The Second Session of the Alaska Legislature in the year 1915, passed an Act containing the following provisions:

"Section 4. Special remedies provided by this Act, or other Acts of the Legislature shall not be deemed exclusive, and any appropriate remedy either civil or criminal or both, may be invoked by the Territory in the collection of all taxes, and in civil actions the same penalties may be collected, as are herein provided in criminal actions.

"Section 7. The Act of which this Act is an amendment is hereby repealed, except in so far as the same is hereby re-enacted, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the Act of which this Act is an amendment, but all such taxes, penalties and interest shall be paid, or collected and enforced in the same manner as taxes herein provided for are collected and enforced."

The Alaska Pacific Fisheries, the plaintiff in error, is a corporation, owning and operating three salmon canneries situate in the Territory of Alaska, all of which salmon canneries were operated by it

during the years of 1913 and 1914, and as a result of such operation, the number of cases of salmon referred to in the complaint of the kinds and varieties therein mentioned were packed and canned during said years, as mentioned in the complaint. During all of said years, and at all times, the plaintiff in error has complied with the Act of Congress passed in the month of June, 1906, and has paid its license taxes under said Act, but did not apply for or receive a license under the provisions of the Act of the Territorial Legislature, passed in 1913, above set out at length. Nor did it pay to the Territory for a license, or otherwise, the amount specified in said Act.

This action was brought by the Territory to recover from the plaintiff in error the sum demanded in the complaint as taxes due the Territory under the provisions of the Act of 1913, hereinbefore set out at length. The taxes sued for are claimed to be due on account of the salmon canned and packed by the plaintiff in error, as above narrated. All these facts were set up in the complaint. To this complaint a demurrer was interposed, which raised and presented to the lower court all the various questions of law hereinafter discussed. The demurrer being overruled, an exception was taken and allowed to such ruling, and the plaintiff in error having elected to stand on its demurrer, judgment was entered as prayed for.

Whereupon, the case was taken to this court on Writ of Error.

ERRORS ASSIGNED AND RELIED UPON FOR A REVERSAL.

First Error Assigned.

That the court erred in overruling the demurrer of the defendant, the plaintiff in error.

Second Error Assigned.

That the court erred in entering judgment for the plaintiff, defendant in error, and against the defendant, plaintiff in error.

ARGUMENT.

The two errors assigned are such that they present the same questions, and can therefore be discussed together.

The first question presented is whether or not the Act of the Territorial Legislature, which forms the basis of this action, creates any civil liability; the second question is whether this Act, taken in connection with the subsequent Act passed in 1915, provides for any civil remedy; the third question relates to the validity of the Act of the Territorial Legislature, upon which this action is predicated; and the fourth question is whether the plaintiff in error can in any event be held liable in view of the provisions of the Act of Congress of June, 1906. These will be discussed in their order.

I.

THE ACT OF THE TERRITORIAL LEGISLATURE CREATES NO CIVIL LIABILITY.

The Act of the Territorial Legislature provides:

"Sec. 1. That any person or persons, corporation, or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain license so to do from the district court or subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to-wit: * * * * * *

Fisheries: Salmon canneries, seven cents per case on sock eye and king salmon; one half cent a case on hump-back, cohoe, or chum salmon.

"Sec. 2. That the license provided for in this Act shall be issued by the clerk of the district court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon.

"Sec. 3. That any person, corporation or company doing or attempting to do business in violation of the provisions of this Act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof

shall be fined, for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; Provided, that each day business is done or attempted to be done in violation of this Act shall constitute a separate and distinct offense; Provided further, that in all prosecutions under this act the costs shall be assessed against any person, firm or corporation convicted of violations hereof, in addition to the fine or penalty imposed, and for failure to pay such fine and costs such person, firm or corporation may be imprisoned, in the discretion of the court, at the rate of one day for every two dollars of said fine and costs; Provided further, however, that in the event of any person, firm or corporation shall fail to pay the license required by the provisions of this act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or tax required by the provisions of this act, judgment may be entered against such firm, person, or corporation and process shall be issued for the enforcement of the collection of said judgment and in the same manner as judgment in civil proceedings."

It will be observed that under the provisions of this Act, it is made an offense to carry on the business of fishing without first applying for and ob-

taining a license, as in the Act provided. Each day during which the business is carried on is made a separate offense. For the first offense, the fine is the amount of the license. For the second offense, the fine is double the amount of the license. For the third offense, the fine is three times the amount of the license together with imprisonment, as in the Act provided.

Upon a conviction, the court is authorized to impose a penalty and the fine having been assessed, after a conviction had, and the defendant having failed to pay the same, the court may imprison the defendant as in the act provided, and may also enter judgment against such defendant for the amount of the fine imposed and this judgment may be collected as other judgments. Nowhere is there any provision in the act providing that the person, firm, or corporation conducting business in violation of its provisions shall become indebted to the Territory in any sum whatsoever. The act is purely penal in its nature. It provides that the doing of certain things shall constitute an offense. It provides the penalty to be imposed after conviction and the manner in which the payment of this penalty, when imposed after conviction duly had, may be enforced.

The offense created consists in doing business without first having obtained the license. And this license can not be obtained simply by paying for it, but an application must first be made to the Court or Judge. This application is filed with the

Clerk, together with the recommendations for the granting of the license and remonstrances against it. The application, together with these recommendations and remonstrances, are then submitted to the Court or Judge, who then makes an order either granting or refusing the license. If the Court orders the license granted, the Clerk issues it upon the payment of the sum specified.

This act differs very widely from the ordinary act proiding for privilege or occupation taxes. Under the ordinary license tax act, the license issued serves no purpose except that of a receipt for the license tax paid. But under this act the license confers a privilege that may be either granted or withheld, depending upon the view that the Court or Judge may take of the matter after considering the recommendations for and the remonstrances against the granting of the license. The language of the act in this regard is the same, and was evidently copied from the provisions in the Alaska Code relating to the sale of intoxicating liquors, as found in Section 2572, of the Compiled Laws of Alaska. The language found in the Act of Congress referred to is as follows: "That the license provided for in this act shall be issued by the Clerk of the District Court or any subdivision thereof in compliance with an order of the court or judge thereof duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against

the granting of licenses and of the action of the court thereon."

It will be observed that Section 2 of the Act of the Territorial Legislature is a verbatim copy of the section just quoted. The only distinction between the act of Congress and the act of the Territorial Legislature being that the act of Congress by subsequent provision provides under what circumstances the Court or Judge shall, and under what circumstances he shall not grant the license. This provision is omitted from the Alaska Act, so that under it the action of the Court or Judge in granting or refusing a license is purely arbitrary, and is guided by nothing except the remonstrances and recommendations filed with the application and submitted to him therewith. This matter will be fully discussed when the effect of this provision upon the validity of the act is considered.

Attention is called to it at the present time to point out that the offense for which the penalty is provided does not consist in a failure to pay the license fee prescribed, and that the liability following the commission of the offense could not be avoided by paying it. Suppose the tax had been paid as required, and the application presented to the court with such recommendations as the applicant might be able to obtain, the remonstrances filed in opposition to the granting of the license might out-weigh the recommendations, and the court might for this or for some other reason, deny the applicant's ap-

plication and refuse to make an order allowing the issuance of the license. The payment of the money would in that case not serve as any protection. The applicant would still be guilty of the offense prescribed, if he persisted in conducting his business. The case falls squarely within the reasoning employed by this court in the case of United States v. Jorden, 193 Fed. 986.

In that case, a civil proceeding was instituted to recover the wholesale fee of a retailer of intoxicating liquors, who was selling at wholesale in violation of the law. The proceeding was instituted under the Act of Congress in force in Alaska, relating to licenses for the sale of intoxicating liquors, which as has already been pointed out, is in respect to the matters above referred to, identical in terms with the Act of the Territorial Legislature now before the Court, the latter being evidently copied from the former. The exact question decided in that case was that a civil action could not be brought to recover the license fee in a case where the defendant had violated the law. But the court in passing upon that matter clearly pointed out the reason why a civil liability did not exist in cases of that character. The Court say:

"The case at bar is unlike that of United States v. Chamberlain, 219 U. S. 250; 31 Sup. Ct. 155; 55 L. Ed. 204, in which it was held that an action would lie by the United States to recover the amount of a stamp tax payable under the war revenue act of

June 13, 1898, upon the execution of a conveyance. The present action is not one to recover a tax imposed upon the performance of an act which all persons are permitted to perform, and which in itself is not in any way regulated or restricted, but it is an attempt to recover a fee which the law prescribed as one of the conditions upon which might be obtained the permission to engage in a specified business which is declared by law to be unlawful without that license. The fee is not a tax imposed upon the business of selling liquor. The statutes of Alaska do not extend to all persons who are willing to pay the license fee permission to engage in the business of selling liquor. The privilege is hedged about with restrictions and conditions, one of which is that the majority of the residents of the vicinage shall consent to the issuance of the license. Nor do the statutes confer upon the district attorney the power to legalize an illegal traffic, and to declare that, after the law has been broken, the lawbreaker shall pay the government the license for doing that for which no license has been given. The defendant in error is not indebted to the government. He has not compiled with the terms upon which he could acquire the right to conduct a wholesale liquor business. He has conducted an illegal business, and has done acts prohibited by law, and for those acts the statutes prescribed but one remedy—the criminal prosecution and punishment of the offense. Of such an offender it was said in State v. Adler, supra:

' "He is a violator of the law, and as such is liable to fine and imprisonment for his offense, but the offense is not that he has failed to pay a sum as taxes on the business transacted, or even that he has conducted the business without payment of the license tax. Payment of the sums fixed as the price of the license would not of itself have legalized the business. Compliance with all the other numerous provisions of the statute would be required to render it legal." '

So also in the case of State v. Adler, 9 So. Rep. 674, referred to by this court in the opinion quoted from, the distinction between a license tax due under a law where the license issues as a matter of course upon the payment of the amount required, and, a license which does not issue as a matter of course, is clearly pointed out. In the last mentioned case, the court say:

"The argument for appellant is that one who has failed to return his property for assessment owes the state, as a delinquent tax-payer, the tax which would have been assessed against it if returned, and, followed to its logical conclusion, would embrace the right of the revenue agent to sue for a fine which one guilty of assault and battery ought under the law be required to pay upon conviction of the offense; for taxes upon unassessed property are not more due and delinquent than is the unimposed fine

of the actually guilty but unconvicted violator of the criminal law."

II.

THE LAWS OF ALASKA DO NOT PROVIDE FOR A CIVIL REMEDY FOR THE COLLECTION OF THE AMOUNT SUED FOR.

The Act of the First Territorial Legislature nowhere provides for its enforcement in a civil proceeding. In that respect, it is altogether similar to the Congressional Acts before this court in the case of United States v. Jorden, 193 Fed. 986, and the case of the United States v. Northwestern Development Company, 203 Fed. 961, also decided by this court. The decision in the latter case relates to the right of the government to collect by a civil proceeding a license tax due under the Congressional Act in force in the Territory, exacting license taxes from those engaged in business and trade. This Act, like the present Act, provided for no civil remedy, and the court held that the criminal remedy especially provided was exclusive.

It is urged, however, that the Territory is given a civil remedy because of the provisions in the Act of 1915, above referred to. That Act in terms repeals the Act of 1913, but contains the proviso that nothing therein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the former act, but it is provided that

such tax, penalty and interest shall be paid or collected and enforced in the same manner as taxes under the Act of 1915 are collected and enforced. And a previous section provides that taxes under the latter act may be enforced by resort to any appropriate remedy, either civil or criminal.

The difficulty, however, is that as has already been pointed out, no tax, penalty or interest is or can be owing under the provisions of the Act of 1913, until after a conviction has been had, and since no conviction has been had there is nothing owing for which the present action can be maintained. Nor can the Act of 1915 supplement the Act of 1913 in this regard, for if the former Act be so construed as to create an obligation not existing under the latter, it would be retroactive in its provisions, and for that reason void.

And while it may be conceded that the inhibition against retroactive legislation does not apply to laws that relate purely to the remedy, it does not follow that a law providing that a civil suit may take the place of a criminal prosecution in the assessment and collection of fines due under a penal law would be valid. Such an Act does not relate purely to the remedy, but creates a civil liability where none existed before.

To use the illustration employed by the Supreme Court of Mississippi in the case above referred to: If such an act were held valid it would be equivalent to saying that a law could be passed pro-

viding for the collection of a fine imposed by law on one committing the crime of assault and battery. In addition to creating a civil liability where none existed before, such an act would deprive one charged with crime of all the safeguards provided by our Constitution and laws in connection with the enforcement of criminal statutes. If a civil remedy could be substituted for one in accordance with criminal procedure, a person violating a criminal statute could be compelled to be a witness against himself and be convicted and compelled to pay the penalty imposed without enjoying the right of a speedy and public trial before an impartial jury, as provided by the Constitution, without being informed of the nature and cause of the accusation, without being confronted with the witnesses against him, and without having compulsory process for obtaining witnesses in his favor, and without having the assistance of counsel. An act of this character therefore can hardly be said to belong to that class which do not come within the inhibition against retroactive and ex post facto laws.

Even if the provisions contained in the Act of 1915 had originally been enacted as a part of the Act of 1913, a civil proceeding could not be brought to collect a fine. To do so would be to deprive the accused of the constitutional rights above referred to; and the provisions so inserted in the act authorizing any such proceeding would be void, because obnoxious to Articles V and VI of the Constitution.

III.

THE VALIDITY OF THE ACT PASSED BY THE TERRITORIAL LEGISLATURE WHICH FORMS THE BASIS OF THIS PROCEEDING.

The Act of the Territorial Legislature is invalid for three reasons; First, it requires the doing of that which is impossible, and is so indefinite and uncertain in its provisions that it can not be enforced. Second, it violates the provisions of the Federal Constitution. Third, it violates the provisions of the Organic Act. These will be discussed in their order.

(a) It requires the doing of that which is impossible and is so uncertain and indefinite in its provisions that it cannot be enforced.

The Act provides, that any one engaging in the business of fishing without first obtaining and paying for a license so to do, seven cents per case on sock-eye and king salmon, one half cent a case on hump-back, cohoe or chum salmon, shall be guilty of a misdemeanor; that each day he carries on such business, or attempts to do so, without obtaining and paying for a license, he commits a seperate and distinct offense; that for the first offense he shall be fined, upon conviction, a sum equal to the amount of the license; for the second offense he shall be fined double the amount of the license; and for the third offense he shall be fined three times the amount of the license, and in addition thereto shall be im-

prisoned for not less than thirty days, nor more than six months.

Section 3 provides in express terms that the amount that must be so paid for the license must be paid in advance. Since it is illegal to commence fishing before a license has been obtained and paid for, the fish on which the person operating the fishery is required to pay the given amount per case cannot be the fish that he has caught and canned, but the fish that he is going to catch and can. The law does not provide when the license shall be taken out, except that it must be taken out before business is commenced, nor how often it is to be renewed. In the case of some of the lines of business mentioned, an annual license is required, but in the case of the fisheries nothing is said about this. But whether the license when issued confers the privilege of fishing and operating canneries for one year, or confers this privilege perpetually, the fact remains that the applicant must predict in advance the number of cases of each of the varieties of salmon mentioned that he is going to catch and can, during the period for which the license is to run, and pay the Territory for a license seven cents per case on all sock-eye and king salmon that he is going to catch and can, and one-half cent a case on all hump back, cohoe or chum salmon that he is going to catch and can, during this period. That this cannot be done is obvious.

Under this provision, one engaged in operating a salmon cannery in Alaska, can never tell wheth-

er his conduct is or is not going to subject him to criminal prosecution, until the result of his fishing operations are known. If he catches no fish, or if his fish spoil before he is able to can them, he escapes. If, however, he catches fish and succeeds in canning them after they are caught, he subjects himself to both fine and imprisonment, the extent of which is determined by the number of cases canned, and the length of time required to catch and can them. He commits a separate and distinct offense for each day that he carries on or attempts to carry on his business, and for the first of these offenses, he is fined the amount of the license, which in turn depends upon the number and kind of cases of fish canned; for the second of these offenses, he is fined in double the amount of the license; for the third offense, the fine is three times the amount of the license and imprisonment not less than thirty days, nor more than six months. If he fishes throughout a whole season, and the court does its full duty in imposing all the cumulative sentences provided for under this act, the fines imposed would greatly exceed the value of his fish pack, and he could barely hope to live long enough to serve his sentence out.

Some difficulties also would be encountered in attempting to enforce this law. If a lawless person engaged in fishing, without first obtaining and paying for a license, should be indicted and brought to trial, the prosecution of course would be called upon to prove the number of cases of fish that he was

about to catch and can, for without this proof it would be impossible to tell the enormity and extent of the crime which the alleged offender had committed or whether he had committed a crime at all. The Delphian Oracle could not be consulted, for the stupified priestess would be aroused from her stupor long before she could be transported to far away Alaska, and it is only those utterances that come from her lips immediately upon being aroused that can be relied upon. And this journey could not be avoided, as the defendant in a criminal prosecution has the right to be confronted with the witnesses against him. The situation would not be measurable relieved if the alleged culprit should plead guilty, for then the court would be required to impose sentence, and the penalty to be imposed is in each case made to depend upon the amount of the license which in turn must be calculated upon the quantity and kind of fish that are to be caught and canned.

It requires neither argument, nor citation of authorities to show that this law can neither be complied with, nor enforced. Attention, however, is directed to the single case of Louisville & Nashville Railroad Co. v. Commonwealth, 35, S. W., 129; 18 Ky. Law Rep. 42 when the rule is stated as follows:

> "For no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

There is, however, still another reason why this

law could not be complied with by the plaintiff in error. The Act provides that the amount of the license tax shall be paid to the Clerk of the Court. No other person is authorized by this Act to receive it, and under a recent decision by this court the Clerk of the court was not authorized, under the Organic Act, to act for the Territory in this regard, he being an officer of the Federal Government.

Callahan vs. Marshal, 210 Fed. 231.

(b) It Violates the Provisions of the Federal Constitution.

The Act of the Territorial Legislature violates the provisions of the Fourteenth Amendment of the Constitution of the United States in that it confers upon the court or judge the power to deprive the plaintiff in error of its property arbitrarily and capriciously.

The Act of the Territorial Legislature provides as follows: "That the licenses provided for in this Act shall be issued by the Clerk of the District Court or any subdivision thereof in compliance with the order of the Court or Judge thereof duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses, and the action of the court thereon." No conditions whatsoever were prescribed in the Act, a compliance with which would entitle an applicant to a license, but the whole matter was left to the arbitrary will of the court or judge.

The court or judge, under this provision, passes

upon an application for a license, and either grants or refuses it, as the case may be, with nothing before him except the recommendations for and the remonstrances against the granting of the license filed with the application. These recommendations may be based upon any ground whatsoever, and this is also true of the remonstrances. Yet it is upon these, together with the application, that the court is required to base its action.

Under this law, the court or judge is endowed with absolute power from which no appeal lies to grant or refuse a license to one following an occupation useful and necessary to society, and to deny an owner of property the right to use his property in all cases where a license is required in connection with such use. Since in acting upon an application the court or judge has nothing before him except the application and the recommendations and remonstrances based upon such grounds as may seem proper to the recommenders and remonstrators, he has nothing to guide him except his caprice and nothing to control him except his arbitrary will.

Nor is this arbitrary power to be exerted in connection with the regulation of those occupations which are liable to endanger the public health or public morals or the good order of society, so that their exercise might in proper cases require police regulation. But the court or judge may, under this act deny to anyone the right to carry on those useful and necessary occupations upon which the well be-

ing of society depends. Included among the industries that cannot be carried on without the permission of the court or judge, granted in the form of a license, are mining and fishing. Not only do the mines and the fisheries lie at the foundation of all industrial prosperity in Alaska, but their products add to the comfort and well being of the whole race. The former fill the arteries of trade with gold, the latter supply a cheap food product that can nowhere be excelled. Yet under this remarkable act, the court or judge is empowered to shut down every mine and every fishery without offering any reason or excuse for so doing.

In the case of those occupations which are considered harmful in themselves, unless controlled and regulated under the police power, it is often essential that the person pursuing such occupations be of good moral character, or that some other suitable condition be complied with, and the question of whether the applicant has a good moral character, or has complied with the requisite conditions, must of course be passed upon by the court, judge or other board or tribunal issuing the license, but even in those cases arbitrary power to grant or refuse a license cannot be lodged in any tribunal. A tribunal may be empowered to determine the question of whether or not the conditions prescribed have been complied with, but it can not be empowered, even in those cases, to grant a license to one and to refuse it to another just because caprice or other similar con-

sideration may dictate that this should be done. This might have been well enough during those primitive times when those subject to established governments were governed by men. But such power can not exist where government by law prevails, and this would be so independent of the constitutional guarantees upon the subject.

In Alaska some concerns engaged in mining and fishing have invested many millions of dollars, yet under this law they are required to make an application to the court or judge for permission to carry on the enterprises in connection with which these investments are made. Nothing in the world that these concerns can do will place them where they can demand a license as a matter of right. Their friends can recommend and their enemies can remonstrate; if the court or judge grants the license it comes as a gracious favor; if it is refused the applicant has not even the right of appeal.

The plaintiff in error is the owner of canneries designed to be used in canning salmon. The right of property of course carries with it the right to its free use and enjoyment, a denial of the right to use property is clearly an invasion of the fight of property itself. This law, therefore, not only confers upon the court or judge arbitrary power to deny to those engaged in fishing the right of following a useful and commendable occupation, and in that manner invades the right of property, for these occupations are properly within the meaning of the provisions of

the constitution, but it deprives the plaintiff in error of property for the further reason that it is denied the right to operate its canneries without permission of the court or judge.

This law violates all the provisions contained in the first section of the Fourteenth Amendment. It abridges the privileges and immunities of citizens of the United States. It deprives persons of property without due process and denies to those within the jurisdiction of the Territory the equal protection of the laws.

A case in all respects like the one at bar was before the Supreme Court of the United States, where it was held that such legislation could not be sustained. Yick Wo v. Hopkins, 118 U. S. 356. An ordinance had been passed by the City of San Francisco, providing that it should be unlawful for any one to conduct a laundry in a wooden building, without a permit obtained from the Board of Supervisors. The ordinance contained no regulatory provisions, but it was contended that it might be sustained as a valid exercise of the police power, because it referred to wooden buildings, which were more liable to take fire if used for laundry purposes than buildings of brick or stone. And Supreme Court of California took this view of it. The Supreme Court of the United States, however, held that the ordinance could not be sustained, either as an exercise of the police power, or otherwise. With reference to this ordinance, the court say:

"The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, without restriction, the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaption of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

And again in the course of the opinion, it is said: "For the very idea that one man may be compelled

to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This case being on al lfours with the case at bar it is not necessary to cite further authorities upon this subject.

(c) It Violates The Provisions of The Organic Act.

The act on its face is a revenue act designed to raise revenue, requireing the payment of a fixed sum in each of the enumerated cases for a license. It is entitled, "An Act to establish a system of taxation, create revenue and provide for collection thereof for the Territory of Alaska and for other purposes." Section one provides, "That any person, or persons, corporation or company, prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska shall first apply for and obtain licenses so to do from the District Court or subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows:

Fisheries: Salmon canneries, seven cents per case on sock-eye and king salmon; one half cent a case on hump-back, cohoe, or chum salmon."

In order to consider the validity of the act in so far as it relates to the matters in dispute it is necessary to ascertain the meaning of the language em-

ployed, in so far as it relates to such matters. That the sole object of the act is the collection of revenue is not disputed. It is conceded that the amount sued for is sought to be recovered as taxes due under the provisions of the act. It remains to be seen, however, whether the tax sought to be collected is a specific property tax or an occupation or business tax generally referred to as a license tax. It is obvious that the tax belongs to one or the other of the two classes named. Its validity will therefor be considered from both view points.

(c) I. Viewed As a Specific Tax on Property.

Whatever power is possessed by the Territorial Legislature of Alaska is derived from the Organic Act. Congress has under the constitution plenniary power to legislate for the territories. It may either exercise this power or it may delegate it in whole or in part to a territorial legislature. In the case of Alaska it has in part only delegated its powers in this regard to the Legislature of the Territory by the Organic Act.

The Organic Act of a territory is a grant of legislative powers. In that respect it does not differ from the charter of a municipal corporation or the constitution of the United States. Such grants are always strictly construed. No power passes except such powers as are either expressly conferred or are conferred by necessary implication. The powers expressly conferred are those that are stated in express

terms. The powers conferred by necessary implication are limited to such as may be necessary to carry into effect the powers expressly granted.

Every sovereign power has the inherent right to collect revenues since this right is necessary to its existence. The Territory of Alaska, however, is not a sovereign power so as to be endowed with this inherent right. It is a mere territory of the United States and its legislature is the creature of the congress; like other legislative bodies similarly created it is endowed with such powers only as are conferred upon it.

The Organic Act contains a provision similar to the general welfare clauses ordinarly contained in the charters of municipal corporations. The provision reads as follows:

> "The Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

Under it the power to raise revenues by means of taxation is in a general way, subject to the limitations elsewhere imposed, conferred; but since legislative grants are strictly construed, the powers thus conferred in a general way must be exercised in strict conformity with the specific requirements of the Organic Act itself and in strict subordination to the limitations imposed.

The organic act contains the following provision: "All taxes shall be uniform upon the same class

of subjects, shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof."

Under this provision three things are necessary. First, all taxes must be uniform upon the same class of subjects. Second, they shall be levied and collected under general laws. And third, the assessments shall be according to the value thereof. The tax in question viewed as a specific tax on property clearly violates two of these provisions. First, it is not uniform upon the same class of subjects. Second, it is not assessed according to the actual value of the thing taxed.

The question of whether the tax sought to be imposed by the Alaska Territorial Legislature is a specific property tax or a license tax becomes important only when the question of whether or not it complies with the requirement that all taxes shall be uniform upon the same class of subjects is considered. For while the tax fails to conform to this provision when viewed from either view point, it contains many of the elements of uniformity when considered as a license tax that are utterly lacking when it is considered as a property tax. If looked upon as a license tax, it at least applies to all who are engaged in the business of operating a fishery. the only difficulty being that each person thus engaged is required to pay a different tax and that this difference in the amount required is not based upon any classification such as a legislature might

have power to make. If considered as a specific tax on property, it is levied on such cases of salmon only as are in the hands of the canneries or fisheries. It is a tax on the salmon of so much per case, but all salmon is not taxed. A merchant, a broker, a fish dealer, or any other person, except some one operating a fishery, may own and have in his possession any quantity of cases of salmon, yet under this act he is not required to pay any tax whatsoever thereon, none except those engaged in the operation of fisheries or canneries being required under the terms of the act to pay any tax.

That the tax is not a tax on the business of operating a fishery or a cannery, but is in fact a tax on the product of the fishery or cannery becomes at once apparent when the language of the act is considered. The act provides that those engaged in the business of operating a salmon cannery shall pay a tax of seven cents per case on sock-eye and king salmon and one-half cent a case on hump-back, cohoe and chum salmon. It does not even provide that the tax shall be paid only on such salmon as are caught and packed at the cannery, for which the license is required. Under the act the tax imposed may be calculated on any fish owned or possessed by the person, or corporation, operating a cannery regardless of how such ownership or possession was acquired. But assuming that the legislature intended to tax only the salmon caught and canned

at the cannery licensed, the tax is still a tax on the product and not on the business.

Suppose the law provided that every one engaged in the business of farming should pay a tax of a given amount on every bushel of grain produced; that every person engaged in the business of manufacturing stoves should pay a fixed amount on every stove manufactured; that every person engaged in the business of operating mines should pay a given amount on every ton of ore mined; no one would contend that the tax in any of the enumerated cases could be considered as a license tax on the business, but it would at once be conceded to be a property tax on the product. Yet a tax exacted from one carrying on the business of operating a cannery, of a fixed amount on every case canned, does not differ in any respect from any of the cases named. Indeed if the product of any business or occupation could be thus taxed under the guise of taxing the business, all personal property might be so taxed, for all such property is the product of industry.

The tax of so much per case on salmon exacted under the provisions of the act of the Territorial Legislature is required to be paid only by those engaged in the business of operating salmon canneries, all other owners of salmon, as has already been pointed out, escape the payment of any tax thereon. Viewed as a property tax, the salmon are the subject of taxation and since some salmon only are taxed, that is to say, those found in the hands of

the fisheries, the tax is clearly not uniform upon the same class of subjects.

The tax also whether viewed as a license tax or a property tax, clearly violates the provision that taxes must be assessed according to the actual value of one thing taxed. The act provides for a tax of seven cents per case on sock-eye and king salmon; one-half cent a case on hump-back, cohoe, or chum salmon. No provision is made in the act for any assessment whatsoever, whereas the Organic Act clearly requires first, that an actual assessment be made, and second, that the assessment so made shall be according to value.

The question as to whether an actual assessment is necessary in such cases was before the Supreme Court of Kentucky in the case of Levi v. City of Louisville, 30 S. W. 973. The city of Louisville had adopted an ordinance prociding that real estate should be taxed at a fixed per cent as well as personalty not used in connection with trades or business on which a license was paid, but the personalty used in connection with such trades and business should not be subject to a further tax.

The question presented for determination related to the right of the city to substitute as to personalty the license tax for a tax under the ad valorem system, and thus tax personalty without making any assessment. The constitution of Kentucky contains the following provision, "All property not exempt from taxation by this constitution

shall be assessed for taxes at its fair cash value." It also contains a provision providing that nothing in the constitution should be so construed as to prevent the imposition of license taxes. It was argued that under these constitutional provisions a license tax might be imposed on the personal estate of those engaged in mercantile and business pursuits, and that uniformity and equality in taxation might be reached by a diversity of means as applied to the various kinds of property. But the court held that such a tax could not be sustained; that under the constitutional provision personal property could not be taxed except upon its cash value ascertained by an assessment of the property. The court say: "The power to prescribe the mode of assessment for ascertaining the value of property has been taken from the legislative control and fixed by the constitution so there is nothing left but to follow its provisions and no authority is given the legislature to value or have property valued but in one mode." Further on in the course of the opinion it is said: "Nor do we find in the constitution a provision of any kind conferring on the municipal government the power to assess property for the purpose of revenue by imposing a license tax. Nor has the legislature the power to authorize the imposition of a tax on the amount of property whether real or personal in any other mode than that prescribed by the Organic Law."

The provision in the Alaska Organic Act, like that of the constitution of Kentucky requires that

there shall be an assessment according to value. No mode is indicated by which the value can be ascertained except upon an assessment. The case therefore falls squarely within the rule as laid down by the Supreme Court of Kentucky.

Nor is it enough that an assessment be made. The Organic Act provides that these essessments must be according to actual value. The act of the Territorial Legislature taxes canned salmon at the rate of so much per case, regardless of its value. Sock-eye and king salmon are taxed seven cents per case, without any regard to how much these salmon will bring in the market, and without any regard to what they are worth. The other kinds of salmon enumerated are taxed one half cent a case, without any regard to value. The tax clearly falls within the definition of a specific tax, which is a tax of so much per article without reference to its value.

While none of the state constitutions contains a provision that all taxes shall be assessed according to value, many state constitutions contain provisions requiring all taxes on property to be assessed according to value. The provision of the Alaska Organic Act differs only from the provisions referred to in the state constitutions in that the former applies to all taxes, including license taxes while the latter is limited in its application to property taxes.

The State Courts have quite generally, at least prior to the time that the case of Welton v. State was decided by the Supreme Court of the United States,

held that license taxes were not taxes on property, but taxes on occupations, so that these did not come within the Constitutional inhibitions that were expressly limited in their application to property taxes. When the validity of a tax of the character sought to be imposed by the Territorial Legislature therefore was called into question, it became important to determine whether the tax was a license tax on an occupation or privilege, or a tax on property, for if the tax belonged to the latter class, the Constitutional provision requiring property taxes to be assessed according to value applied, and it was necessary that the tax should conform to this requirement. The decisions of the courts rendered, under these circumstances, are to the effect not only that under a Constitutional provision that property taxes must be taxed according to value, taxes levied at so much per article cannot be sustained, but that taxes purporting to be license taxes of the character now before the court are in fact property taxes, regardless of what they may be called by the Legislature, and that being property taxes they must conform to the Constitutional requirement that property taxes shall be assessed according to value.

In Re Tax Delinquency in St. Louis County, 73 N. W. 970.

Standard Oil Company v. Commonwealth, 82 S. W. 1020.

Pittsburg, Etc., Railroad Co. v. State, 31 N. E. 435.

State v. Bengsch, 70 S. W. 710.
Minces v. Schoenig, 75 N. W. 711.
Pittsburg, etc., Railroad Co. v. Pittsburg, 60 Atl. 1077.
Brookfield v. Toory, 43 S. W. 387.
Ellis v. Frazier, 63 Pac. 642.
Livingston v. Albany, 41 Georgia 21.
Sims v. Parrish of Jackson, 22 La. Ann. 440

The case of In Re Delinquency in St. Louis County, arose in Minnesota. Minnesota's laws contained a provision that mining companies might pay into the State Treasury in lieu of all taxes or assessments upon capital stock, personal and real estate, of such companies in or upon which such business of mining might be carried on, or which was connected therewith, and set apart for such business the following amounts, towit: for each ton of copper, fifty cents and for each ton of iron ore mined, shipped or disposed of, one cent. The Constitution of the State of Minnesota, Art. 9, Sec. 1, contains the following provision: "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state." The court held that under this Constitutional provision, the law relating to the taxing of mining companies was void. In passing upon the question, the court say:

"It would be difficult to conceive of a

system of taxation more obnoxious to the Contsitution."

The case of Standard Oil Company v. Commonwealth arose in the State of Kentucky. In that case, the court had before it an act of the Legislature imposing a license tax of ten dollars on oil depots. The Constitution of Kentucky contains a provision requiring all property taxes to be assessed according to value but allowing the imposition of license taxes. The question therefore arose whether this was a license tax or a property tax. If property tax, the Constitution required it to be according to value; if a license tax, it might stand since the Constitution expressly provided that license taxes might be imposed without regard to this Constitutional requirement. The court however held, that notwithstanding the fact that the tax was called a license tax by the Legislature, it was a property tax, and that as such it was void because not assessed according to value.

The case of Pittsburg, Cincinnati and St. Louis Railroad Co. v. The State, arose in Ohio. The question before the court in that case was whether a law exacting a fee of $1.00 per mile from railroads operating in the State of Ohio, exacted a fee under the police power or laid a tax on property. Under the provisions of the Constitution of Ohio, the Legislature had the usual power to exact fees in the exercise of the police power for the purpose of paying the cost of regulation. But the court held the exaction to be a tax on the railroads of the State,

notwithstanding the fact that it was called a fee, and that it was void because it lacked uniformity and was not assessed according to value, as required by the Ohio Constitution. In the course of the opinion, the Supreme Court of Ohio say:

> "What is this statute? Its constitutionality must be determined by its operation. It provides in terms that there be placed upon each mile of railroad track within this state an exaction of $1.00 per annum; the statute calls it a 'fee,' but its nature is not affected by the name that may be assigned to it."

The case of State v. Bengsch arose in Missouri. The Legislature of that state had passed an act that provided among other things, as follows:

> "There shall be paid for the right and privilege to manufacture for sale in this state distilled liquors, including whisky, brandy, rum, gin and distilled spirits of all kinds, wines of any kind and every class of vinous liquors, and for the right or privilege to sell all such distilled or vinous liquors or products, brought or shipped into this state for sale herein, a special license tax of ten cents for every gallon, and at a like rate for any other quantity or fractional part of a gallon contained in a receptacle of any kind or character whatever."

The Constitution of the State of Missouri provided that property taxes should be assessed according to value, and the court held this to be a property tax.

The case of Miness vs. Schoenig arose in Minnesota. An ordinance of the City of Winona providing for the licensing of those conducting bankrupt sales, provided among other things, that those so engaged would be required to pay a tax of two per cent of the amount of their gross receipts. The Constitution of Minnesota contained a provision requiring property taxes to be assessed according to value. The court held that portion of the ordinance above referred to void as being on conflict with the Constitution. In the course of the opinion, the Supreme Court of Minnesota say:

> "This mode of taxing is so palpably in conflict with Section 1, Art. 9 of the Constitution which requires that all property on which taxes are to be levied shall have a cash valuation, that it cannot stand for a moment. The Legislature itself has not power to adopt any such system of taxation, or to grant authority to a municipality to do so."

The case of Pittsburg Railroad Co. vs. Pittsburg, arose in Pennsylvania. In this case, it was held that a license tax upon street railways of 25 cents per foot for each lineal foot of track was not a license tax notwithstanding the fact that it was so called, but was in fact a property tax upon the tracks of the street railway companies.

The case of Brookfield v. Toory, arose in Missouri. The city of Brookfield in that state had passed an ordinance requiring merchants to pay a licens-

tax, the amount of the tax required in each case being one per cent upon the cash value of the stock of goods, wares and merchandise kept on hand for sale. The court held that this was not a license tax, but a tax upon the merchants' stock. In the course of the opinion it is said:

> "In a word can this tax of one per cent upon the cash value of the goods on hand be held as an occupation or privilege tax. After a careful investigation of the question mooted and most ably discussed by counsel, it seems palpable that this is a property tax pure and simple. It is an obvious misnomer to call it a tax upon occupation."

The case of Ellis v. Frasier arose in Oregon. The Legislature of Oregon had passed an act imposing a tax of one dollar and twenty-five cents on bicycles within certain counties. The owner of a bicycle was required to pay one dollar and twenty-five cents in return for which he received a tag to be attached to the bicycle. It was urged that this was a license fee. The court decided that fees exacted under the police power were the only money exactions that were not required to conform to the Constitutional provisions of Oregon, which require uniformity, and require property taxes to be assessed according to value, and it was further held that this tax was a property tax, and since it was not assessed according to value as required by the Constitution it was void. Several other matters discussed in this opinion, reference to these will be had, when the

case is more fully discussed, elsewhere in this brief.

The case of Livingston vs. Albany arose in Georgia. In that case, the Supreme Court of Georgia held that a tax upon the sale of horses or mules, or upon horses or mules sold is a property tax; that the Legislature had power to impose or authorize the authorities of a municipality to impose a tax upon all such sales made by drovers, as they were a distinct class of traders, but that such tax when imposed must be ad valorem and that a tax upon each horse of a certain amount was not ad valorem.

In the case of Sims v. The Parrish of Jackson, the Supreme Court of Louisiana held that a tax of a specified sum on every given quantity by weight of cotton produced violated a provision in the Constitution which requires the tax to be equal and ad valorem. Such tax was held to be a specific tax and not an ad valorem tax.

It is not a matter of great importance under the provision of the Alaska Organic Act requiring assessment according to value whether the tax sought to be imposed by the Territorial Legislature is a license tax or a property tax in view of the fact that the provision requires "all taxes" to be assessed according to value regardless of their character. The matter is however of some importance, as has been pointed out, when the question of whether the tax is in fact uniform is considered. In addition to what has been said it may here be noted that the Supreme Court of the United States has by a uniform

rule of decision held license taxes of this character to be in fact property taxes regardless of the name given them by the Legislature.

In the case of Brown vs. Maryland, 12 Wheat. 419, it was held that a tax on the occupation of an importer was the same as a tax on imports and therefore void. In that case Chief Justice Marshall said:

> "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

It was largely upon the authority of this case, and the language thus expressed by Chief Justice Marshal that the Supreme Court afterwards in the case of Pollock v. Farmers' Loan & Trust Co. based its decision, holding incomes derived from property to be taxes on the property, from which such incomes were derived.

The decision in the case of Brown v. Maryland was followed by the Supreme Court of the United States in the case of Welton vs. State, 91 U. S. 278. The Legislature of the state of Missouri had passed a law exacting a license tax from peddlers selling merchandise manufactured outside of the state. This act was held to be an interference with interstate commerce and void. It was urged that the license

tax was required from the peddler and was not a duty imposed upon the goods he sold; that the goods were the subject of interstate commerce and not the peddler, that for this reason the license tax did not interfere with interstate commerce, but the court held that a license tax exacted for the sale of goods was in effect a tax upon the goods themselves. In passing upon this question, Mr. Justice Field, speaking for the Court says:

> "The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the state.
>
> "The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, if will not be

any the less invalid because enforced through the form of a personal license."

(c) 2. Validity of The Tax When Viewed As a License Tax.

The power of the legislature to levy or collect taxes, does not exist as an inherent power but because of a grant contained in the Organic Act and must, as was said when the validity of specific property taxes was being discussed, be exercised in strict subordination to the provisions in the Organic Act expressly limiting that power.

The act requires that "ALL TAXES SHALL BE UNIFORM UPON THE SAME CLASS OF SUBJECTS AND SHALL BE LEVIED AND COLLECTED UNDER GENERAL LAWS AND THE ASSESSMENTS SHALL BE ACCORDING TO THE ACTUAL VALUE THEREOF." This provision requires all taxes to be uniform upon the same class of subjects, requires all taxes to be levied and collected under general laws and requires all taxes to be assessed according to the value of the thing which is the subject of taxation—under it there must be uniformity, there must be an assessment and the tax must be based upon value. Again, the provision applies to all taxes meaning each and every tax; its effect is nowhere limited to property taxes, nor does it contain an exception in favor of licenses taxes.

The tax in question violates these provisions in the Organic Act in that it is not uniform upon the

same class of subjects and in that it is not assessed according to the value of the thing taxed. While all those engaged in operating salmon canneries are required to obtain and pay for a license, there is no uniformity in the amount that the licensees are required to pay. In fact the amount required is different in each case, depending upon the number of cases of the various varieties of fish packed. While the legislature has the power to classify the things which are the subject of taxation, it has not the power to place each individual taxpayer in a class by himself. This is not classification.

Nor is the tax assessed according to the value of the thing taxed. Viewed as a license tax the business of operating a fishery or salmon cannery is the subject of taxation and of course no attempt is made to assess this business or occupation for taxation. The amount of the tax in no sense depends upon the value of the business or occupation.

The learned trial judge, however, in the case of the Territory of Alaska, v. Alaska Pacific Fisheries, Case No. 2709, expressed the opinion that a tax in many respects similar to this tax was a license tax, and that taxes of this character could be levied without complying with the requirements of the provision referred to, notwithstanding the fact that by its express terms, "all taxes" without exception are made subject to the requirements mentioned. This view is based upon an erroneous conception of the effect of some of the decisions of the state courts.

These decisions were rendered in states having a variety of constitutional limitations and restrictions upon the taxing power, all unlike the provision contained in the organic law of Alaska. Of course the effect of a limitation contained in the organic law of any state or territory must depend in each case upon the language of the provision containing the limitation; and the decisions of the courts relating thereto must be read in the light of the language of the provision construed.

By many of the state constitutions license taxes are expressly provided for or excepted from the operation of the requirements of uniformity and assessment according to value. By others the provisions containing these requirements are expressly limited in their application to property taxes. By the Organic Law of Alaska all taxes, without exception, must comply with the requirements of uniformity and assessment according to value. An examination of the decisions upon which the opinion of the learned trial Judge is based will disclose the fact that they can all be distinguished for one or the other of the reasons given except only those cases which relate to licenses exacted for the purpose of regulation under the police power as distinguished from license taxes exacted for the purpose of revenue under the taxing power. These cases of course rest upon an entirely different principle.

When in the interest of the public health, the public morals or the public safety it becomes neces-

sary to supervise or regulate an occupation or business, the legislature may require a license from those engaged therein for the purpose of regulating the same, and may in that connection adopt such regulatory provisions as may be necessary, it may also require the payment of a license fee sufficiently large to pay the costs of issuing the license and in addition thereto the costs of supervision and regulation. The fees required to be paid, however, cannot exceed the amount necessary for the purposes mentioned, and must be exacted in good faith to meet the expense of regulation and not for the purpose of raising revenue. In so acting the legislature proceeds under the police power of the state. In the exercise of the police power the legislature is of course not restricted by the limitations placed upon the taxing power and it is for that reason that the validity of laws exacting license fees is not effected by provisions in the organic law relating to taxes. Such license fees are not taxes and depend for their validity not upon a compliance with constitutional requirements relating to taxes, but upon the question of whether the regulation in connection with which they are exacted is reasonably necessary to promote the public health, public morals or public safety.

Not so in the case of license taxes. These have nothing to do with the public health, public morals or public safety, in imposing license taxes the object and aim of the legislature is the collection of revenue. In character a license tax does not differ

form any other tax. It is levied against the occupation or business of the person called upon to pay it just as a property tax is levied against the property of the person called upon to pay such tax, the object in each case being the production of revenue for the support of the government. The only difference between a license tax and a property tax lies in the procedure provided for enforcing the collection of the tax.

The collection of a property tax can be enforced by a seizure and sale of the property taxed. Collection of a license tax cannot be thus enforced because of the intangible character of the occupation or business which forms the subject of the tax. The only practical method by which the collection of this tax can be enforced consists in providing that it shall be an offense to pursue the occupation or business taxed without first paying the tax.

The procedure followed is similar to that pursued in the collection of license fees under the police power. A license is required but this license performs no office except that it serves as a receipt for the taxes paid. When a license is granted under the police power it serves as a permit to do that which without the license would be unlawful because of its harmful effect upon the public health, public morals or public safety if permitted to be done without the restraint of the license and proper regulation thereunder—a right is conferred upon the recipient of the license which he did not have before it was is-

sued. When, however, a license is issued to one in connection with the payment of a license tax no new right is conferred upon the recipeient. The occupation or business licensed is not one which requires regulation and restraint in order to prevent injury to the public health, morals or safety, but is a useful one by which the Public health, morals and safety, as well as the public welfare are promoted. The recipient of the license had a right under the constitution to follow an occupation or business of this character without a license just as one has the right to the ownership and enjoyment of private property without a license. In exacting the license tax the government merely exercises its right to levy a tax against the occupation or business of the citizens for the purpose of defraying the expense of government, just as it levies a tax against the property of the citizens for such purpose. Nothing more, nothing less. There is no difference between a license tax and a property tax. The apparent difference arises from the fact that in one case the thing taxed is tangible, in the other intangible, which necessitates different methods of procedure when it comes to enforcing collection. Both are taxes in every sense of the word and being taxes must conform to the requirement of the orgainc law as to uniformity and assessment according to value unless, indeed, the provsiions containing these requirements differ from those contained in the organic act of Alaska in that they are so worded as to be limited to one or to exclude the other.

There is no similarity between license fees exacted under the police power and licenses taxes exacted under the taxing power, although the method of procedure for their enforcement may be the same. As was said by Judge Cooley in his work on taxation page 396, "The distinction between a demand of money, under the police power, and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power."

It will be seen therefore that the decisions that relate to license fees exacted under the police power have no application to the facts in this case. (Throughout this discussion the nomenclature found in most of the cases upon the subject, is followed; that is to say money axactions under the police power are referred to as "license fees," while those under the taxing power are referred to as "license taxes." In some of the caess the terms, license fees, license taxes and occupation taxes are all used, sometimes interchangeably, where money exactions under the police power are referred to.)

The various provisions contained in the organic laws of the various states and territories will next be discussed with a view of determining the applicabil-

ity and effect of the decisions under each.

The constitution of the State of Alabama contains the following provisions: "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property The legislature shall not enact any law which will permit any person, firm, corporation or association to pay a privilege, license or other tax to the State of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the state."

The constitution of the State of Arkansas provides as follows: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

The constitution of the State of Florida provides as follows: "The legislature shall provide for a uniform and equal rate of taxation and shall prescribe such regulations as shall secure a just valuation of all property The legislature may also provide for levying a special capitation tax and a tax on licenses."

The constitution of the State of Illinois con-

tains the following provisions: "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons, to be selected or appointed in such manner as the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests, or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

The constitution of the State of Idaho contains the following provisons: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, or her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state); also a per capita tax All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall pre-

scribe such regulations as shall secure a just valuation of all property, real and personal."

The Montana Constitution provides as follows: "The necessary revenue for the support and maintenance of the state shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The Legislative Assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

The constitution of Nebraska contains the following provision: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the tax to be ascertained in such manner as the Legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct, uniform as to the class on which it operates."

The constitution of the state of Louisiana contains the following provision: "Taxes shall be equal and uniform throughout the limits of the authority levying the tax, and all property shall be taxed in

proporition to its value." Provision is also made for a license tax, to be graduated upon persons pursuing the several trades, professions, vocations, and callings. All occupations may be liable to such tax except those of clerks, laborers, clergymen, school teachers, those engaged in mechanical, horticultural, agricultural, and mining pursuits, and manufacturers, other than those of distilled, alcoholic, or malt liquors, tobacco, cigars, and cottonseed oil.

The constitution of the state of North Carolina provides as follows: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property And provided, further, That the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business."

The constitution of the state of Texas contains the following provision: "Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll-tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this state. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged

in mining and agricultural pursuits, shall never be required to pay an occupation tax."

The constitution of the state of Tennessee provides: "All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they from time to time direct."

The constitution of the state of Utah provides as follows: "The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money Nothing in this constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax based on income, occupation, licenses, franchises, or mortgages."

The constitution of the state of Virginia provides as follows: "All property, except as hereinafter provided, shall be taxed, all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws The General Assembly may levy a tax upon incomes in excess of $600 per annum; may levy a license tax up-

on any business which cannot be reached by the ad-valorem system."

The constitution of the state of West Virginia contains the following provision: "Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be asecrtained as directed by law The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations."

The constitution of the State of Kentucky contains the following provisions: "Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. All property shall be assessed at its fair cash value. All property, whether owned by natural persons or corporations shall be taxed in proportion to its value The General Assembly may by general laws only provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

The organic act of the Territory of Oklahoma provides as follows: "Nor shall any unequal discrimination be made in taxing different kinds of

property, but all property subject to the taxation shall be taxed in proportion to its value: Provided, That nothing herein shall be held to prohibit the levying and collecting license or special taxes in the territory from persons engaged in any business therein, if the legislative power shall consider such taxes necessary."

It will be observed that the constitution of each of the states above referred contain express provisions authorizing the collection of license taxes. The language employed varies, but in each case it is clear that the framers of the constitutions intended to authorize the legislature to impose and collect license taxes for the purpose of revenue as distinguished from license fees exacted in connection with the requirement of a license for the purpose of regulation. It is needless to say that the courts in the states above mentioned have uniformly held that the legislature had the power to raise revenue by means of a license tax. Even in the states mentioned, however, it has been quite generally held that license taxes must be uniform upon the same class of subjects.

While the decisions of the courts under constitutions containing express provisions authorizing the enactment of laws requiring license taxes can have no application to a case arising under the organic act of Alaska, where no such provision exists, it is a noteworthy fact that the framers of these constitutions deemed it necessary to insert these express

provisions in order to reserve the right to collect revenue by means of license taxes. Obviously they took the position that the insertion of the provisions with reference to uniformity and assessment according to value would destroy the right to collect license taxes unless that right was expressly reserved. No other reason can be assigned for the action taken.

A consideration of the Oklahoma organic act discloses the fact that Congress also took the view that unless the right to collect revenue by means of license taxes was expressly reserved, that right would be destroyed by the insertion in the organic act of a provision requiring uniformity and assessment according to value. Had it been the intention of Congress to permit the Alaska Legislature to raise revenue by means of license taxes it would have taken the same action that it took in the case of Oklahoma and reserved that right by a similar provision. The failure of Congress to reserve to the Alaska Legislature this right is, however, easily accounted for.

An examination of the organic act will disclose the fact that the powers conferred upon the Alaska Legislature are everywhere limited and circumscribed and the limitation upon the power to levy taxes without reserving the right to raise revenue by means of license taxes is in harmony with the general purpose of Congress to limit the power of the legislature as expressed by the organic act, taken as a whole. The sparsely settled condition of the territory, its vast extent and other peculiar condi-

tions not met with elsewhere are the reasons that suggest themselves for thus limiting the power of the Territorial Legislature. In denying the right to raise revenue by means of license taxes, Congress must had had in mind not only the peculiar conditions existing in the territory, but also the unusual provisions of the organic act with reference to representation in the legislature made necessary because of these peculiar conditions. Under the organic act each judicial division, regardless of its population, or wealth, is allowed four representatives in the lower house and two in the upper house of the legislature; that this arbitrary apportionment of the number of representatives to which the various parts of the territory should be entitled in the legislature might lead to serious abuses in connection with the imposition of license taxes, must have been apparent to Congress.

The industries carried on in the territory are such that each is carried on in its own peculiar locality and not elsewhere, at least not to any extent, so that a license tax on any industry falls on the particular locality only in which that industry is carried on. The temptation of working for and voting for a license tax on an industry not carried on in his division is constantly held out to each member of the legislature.

The mines and the fisheries form the basis of all industrial activity in the territory. The fisheries are located along the coast in the first and third

divisions and the quartz mines also are located near the seashore in these same divisions, while the placer mines are found in that portion of the third division extending back into the interior and in the second and fourth divisions. Thus a license tax imposed upon the fisheries burdens the coast regions of the first and third division only, a license tax on the quartz mine operations falls exclusively upon the same localities, while a license tax upon placer mine operations effects only the second and fourth divisions and that part of the third division which extends into the interior.

Not only must Congress be presumed to have had these things in mind but also the fact that a license tax is a convenient tax to impose and that its burdens fall upon a limited number only who are not always represented in the legislature, and that if, therefor, such taxes were imposed with the view of relieving property from taxation the legislature would only be following naturally along the lines of least resistance and greatest traction.

The members of the legislature that passed the law under consideration undoubtedly acted in the best of faith. They were undoubtedly honest men who acted honestly. Yet the injustice and inequality resulting from this character of taxation, regardless of the honesty and good faith with which it is invoked, and against which Congress undoubtedly intended to protect the people of Alaska, becomes apparent when the present law is examined.

The legislature never made any provision for the levying of any property tax whatsoever. All the money required to pay the expense of the Territorial Government is sought to be collected by means of license taxes. No substantial license tax is exacted from anyone engaged in any industry except the mines and fisheries. Nor are all the mines taxed, the mines are not taxed unless they yield a net income in excess of five thousand dollars per annum. The low grade character of the quartz mines makes it necessary to employ large units in connection with their operations. Enormously large capitals are required to successfully operate these mines, and of course, if the operations prove successful, the income is correspondingly large, so that the five thousand dollar exemption makes no practical difference one way or the other. The placer mines on the other hand are operated in small units so that while there are comparatively few quartz mines in operation the number of placers in operations is almost infinite, and while the aggregate yield of the placers may exceed that of the quartz mines, the yield of any one placer is comparatively small and does not except in isolated cases produce a net income of more than five thousand dollars. And even where the net income exceeds five thousand dollars it must always be a difficult matter to collect a tax thereon in view of the fact, as is a matter of common knowledge, that accurate books of account are rarely kept in connection with the conduct of

small individual enterprises. It follows that under this law the fisheries and the quartz mines situated along the coast in the third and first divisions are called upon to pay all but a very small per cent. of the taxes required to meet the expense of the Territorial Government. This in spite of the fact that the fisheries are also required to pay a tax to the federal government under the act of June 1906 and the quartz mines are required to pay a tax to the federal government of three dollars per stamp under the act of Congress.

The constitutional provisions in any wise similar to the provision in the Organic Act of Alaska, found in the various state constitutions, and unaccompanied by other express provisions limiting their effect so as to have no application to license taxes or providing in express terms for the imposition of license taxes, will next be considered together with the decisions of the state courts thereunder:

The constitution of the State of California contains the following provisions:

> "all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, franchises and all other matters and things, real, personal and mixed, capable of private ownership."

"The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations or upon the inhabitants or property thereof for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The constitution also expressly provides that income taxes may be assessed and collected.

The provisions of the constitution of California first above quoted are not only expressly limited in their application to property taxes, but the meaning of the word "property" as therin used in expressly defined.

Under the decisions of the state courts generally, which differ in that regard from the decision rendered by the Supreme Court of the United States in the case of Welton vs. State, 91 U. S. 278, hereinbefore referred to, license taxes are not regarded as taxes upon property. They are regarded as taxes upon occupations, and these occupations are in turn regarded as intangible things separate and distinct from the property used in pursuing such occupations. Viewing license taxes in this light, constitutional provisions which are expressly limited in their application to property taxes, such as is the provision in the California Constitution above quoted, can have no application to license taxes, since these are not regarded as taxes upon property. There is then in the

California constitution no provision to which license taxes must conform. The decisions under that section of the constitution prohibiting the imposition of taxes on counties, cities, etc., however, shed light upon the meaning of the words "all taxes" as employed in the Organic Act of Alaska.

The legislature of the State of California had passed a law requiring those engaged in certain kinds of businesses to take out a license and pay therefor fixed sums which were to be turned into the county treasury. This law was before the Supreme Court of California in the case of People vs. Martin, 60 Cal. 153. Its validity was assailed on the ground that the legislature had no power under the constitution to collect taxes for county purposes. It was contended that the license tax imposed was not a tax within the meaning of the constitution. It will be observed that the constitutional provision is not limited in its application to property taxes in that the taxes prohibited are those "upon the inhabitants or property thereof." This clause in the constitution, the Supreme Court of California held included not only property taxes, but also license taxes which were taxes upon the inhabitants. This act was held void. In passing upon this matter, Judge Ross, who was then a member of the Supreme Court of California, speaking for that Court, says:

> "The important question in the case is, whether or not the word 'taxes' as used in this section of the constitution includes license tax-

es; for, if it does, the provisions of the Political Code imposing and providing for the collection of the license tax here in question, are clearly inconsistent with this section of the constitution, and therefore inoperative by virtue of Section I of Article XXII of the same instrument.

"That the license fees imposed by the provisions of the Political Code were so imposed mainly, if not solely, for the purpose of revenue, does not admit of doubt; and where that is the case, they are, in effect, taxes. (Cooley on taxation, pages 396-7; 2 Dillon on Mun. Corp. Sec. 768.) Indeed, the statute itself designates the charge as a license tax. (Political Code, Sec. 3,359.)

"But are they 'taxes' within the meaning of Section 12 of Article XI, of the Constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon property; for by its express language the legislature is prohibited from imposing taxes upon the inhabitants of counties, cities, towns, or other public or municipal corporations, as well as upon their property, for county, city, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for as already

observed, the statute authorizing it, required the tax when collected to be paid into the County Treasury for the use of the County General Fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the Legislature;"

This decision is especially applicable to the present case in that it clearly shows the reason why some of the provisions in the various state constitutions are not applicable to license taxes. These provisions are limited to taxes on property by their express terms just as is the first provision above quoted from the California Constitution. But the provision before the Court in this case was not so limited but applied to taxes on the inhabitants and taxes on the property alike, which made it in all respects similar to the provision in the Alaska Organic Act, which is applicable by its terms to "all taxes" without regard to their character.

One of the judges then a member of the Supreme Court of California dissented, taking the same view that the learned trial court took in this case, that license taxes were to be distinguished from other taxes in some manner and were not to be regarded as included within constitutional provisions relating to taxes, a view that resulted from confusing license taxes exacted under the taxing power with license fees exacted under the police power.

The Supreme Court of California in rendering subsequent decisions, however adopted the views ex-

pressed by Judge Ross and concurred in by the majority of the court as law. See Ex Parte Schuler 139 Pac. 985. And the Supreme Court of Missouri in construing a constitutional provision containing the same language, as will be pointed out when the provisions of the constitution of that state are discussed, adopted the same construction.

The constitution of the State of Colorado provides as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws, which shall prescribe such regualtions as shall secure a just valuation for the taxation of all property real and personal."

Under this constitutional provision it has been held in Colorado that a license tax can be laid and collected. It will be observed that the constitutional provision contains the following "which shall prescribe such regulations as shall secure a just valuation for the taxation of all property real and personal." This provision of course by its terms is applicable only to property taxes.

The constitution of the State of Delaware provides as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws,"

The effect of this constitutional provision does not seem to have been passed upon by the Supreme Court of Delaware in so far as it affects license taxes.

The constitution of the State of Georgia provides as follows:

> "All taxes shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

It will be observed that under this constitutional provision all taxes, without regard to their character, are required to be uniform upon the same class of subjects. It is accordingly held by the Supreme Court of Georgia that license taxes must conform to this provision. It will be further observed that the requirement that taxes shall be ad valorem is expressly limited to property taxes. Under this constitutional provision therefor licenses taxes are excepted from the provision that taxes must be according to value. This constitutional provision therefore permits the levying of licenses taxes, though such taxes are not levied according to value, or ad valorem provided they are uniform upon the same class of subjects, and this has been the construction placed upon the provision by the Supreme Court of Georgia.

The Supreme Court of Georgia, however, went somewhat further and held that where a license tax on merchants was graduated in proportion to the

volume of business transacted, the tax should be according to value, notwithstanding the fact that the constitutional provision requiring taxes to be ad valorem was limited expressely to property taxes. The Court say: "It is true that the clause cited in words applies to property, but in sense and spirit we think it covers a business tax scaled by the amount or value of the business transacted." Johnson vs. Macon, 62 Ga. 645. In this case it was further held that a license tax law graded in proportion to the amount or value of business transacted as above indicated was not sufficiently uniform upon the same class of subjects.

The constitution of the State of Indiana provides as follows:

> "That the general assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall provide such regulations as shall secure a just valuation for taxation of all property both real and personal."

The provisions of this constitution it would seem are clearly limited so as to apply to property taxes only. Nevertheless the Supreme Court of Indiana in the case of Henderson vs. London & Lancashire Ins. Company, 135 Ind. 24, held that a tax on the business of such foreign insurance companies as were doing business in counties having cities with paid fire departments, which tax was to create a fireman's fund, violated the constitutional provision requiring equality and uniformity of taxation as it ap-

plied only to a portion of the class of foreign insurance companies, and the power of the whole state was thus exercised on a portion of the class for the benefit of a small part of the citizens of a few cities of the state. This decision indicates the tendency of the state. This decision indicates the tendency of the courts to apply the constitutional provisions of this character to license taxes wherever possible.

The constitution of the state of Kansas provides as follows:

> "The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family shall be exempted from taxation."

This constitutional provision by its terms deals with taxation of property only and accordingly the Supreme Court of Kansas held that it did not apply to license taxes.

The constitution of the State of Maine contains the following provision:

> "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just valuation thereof."

This provision like that contained in the Indiana Constitution is by its terms limited in its application

to taxes on real and personal estate and does not therefor apply to licenses taxes.

The constitution of the State of Minnesota provides as follows:

> "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state Laws shall be passed taxing all moneys, credits, investments, in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property, according to its true value in money."

It will be noted that the provision in this constitution requiring equality applies to all taxes alike, but that the remaining provisions requiring levies to be made according to cash valuation, and taxes to be assessed according to value are expressly limited in their application by the terms of the provision to property taxes. It was accordingly held by the Supreme Court of Minnesota that all license taxes must be uniform, and further that all taxes upon property must be assessed according to value. Willis v. Standard Oil Co., 52 N. W. 652-4; In Re Tax Delinquency in St. Louis County, 75 N. W. 970; Minces v. Schoenig, 75 N. W. 711;

In the case of Willis v. Standard Oil Company, the Supreme Court of Minnesota was called upon to pass on the validity of a law providing for the payment of a fee to inspectors of oils. All oils shipped

in and used for illuminating purposes were required to be inspected and the inspector was, for such inspection, entitled to certain fees. The objection was made that the fees exacted were exacted for the purpose of revenue and that the measure was in fact a measure designed to raise revenue. The Court held if that were the object of the measure, it could not be sustained under the constitutional provision. The court says: "It is also objected that the act is one levying a tax, and not a police regulation. Of course, under the constitutional provision requiring taxes to be as nearly equal as may be, and to be levied on a cash valuation, the law could not be sustained as a tax law. It can only be upheld as an exercise of the police power of the state;"

In the case of in Re Tax Delinquency in St. Louis County, the Supreme Court of Minnesota passed upon a law providing that mining companies might pay in the state treasury annually, in lieu of all taxes or assessments upon capital stock, personal and real estate, of such companies in or upon which real estate such business of mining might be carried on, or which was connected therewith, and set apart for such business the following amounts, to-wit: For each ton of copper, fifty cents, and for each ton of iron ore mined, shipped or disposed of, one cent. The court held that under the Minnesota Constitution the act was void, and in passing upon the matter they say: "It would be difficult to con-

ceive of a system of taxation more obnoxious to the Constitution."

In the case of Minces v. Schoenig, the court had before it an ordinance passed by the City of Winona which contained the provision that those who conducted bankrupt sales were to obtain a license and in addition to the payment of a fee, justified under the police power, were required to pay a tax of two per cent. of the amount of the gross receipts. In holding this ordinance void, the court say: "This mode of taxing is so palpably in conflict with Section 1, Article 9 of the Constitution which requires that all property on which taxes are to be levied shall have a cash valuation, that it cannot stand for a moment. The legislature itself has not power to adopt any such system of taxation, or to grant authority to a municipality to do so."

The constitution of the State of Michigan contains the following provisions:

> "The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law All assessments hereafter authorized shall be on property at its cash value.
>
> "The legislature shall provide for an equalization of a state board in the year 1851, and every fifth year thereafter, of assessments

on all taxable property except that paying specific taxes."

The Supreme Court of Michigan held that the term "specific tax" used in the constitutional provision embraced license taxes, a license tax being of course a specific tax on business.

Under the constitution of the State of Massachusetts the legislature is empowered

> "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities, whatsoever, brought into, produced, manufactured, or being within the same."

The effect of this constitutional provision was before the Supreme Court of Massachusetts in the case of Portland Bank v. Apthorp, 12 Mass. 252-256. The legislature had enacted a law taxing banks one-half of one per cent. on the amount of their capital stock. In discussing the validity of this law in the light of the constitutional provision, the Supreme Court of Massachusetts hold that the tax could not be justified under the first part of the provision and in that connection the court say: "Under the first branch of this power, namely, that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for those taxes must be

proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the constitution."

It will be observed from the language quoted that the assessment of a license tax would be considered as prohibited under the constitutional provision if the first portion of the provision alone were considered, yet this portion of the constitution of Massachusetts does not at clearly and definitely apply to all taxes alike as does the provision in the Alaska organic law.

The tax in question was, however, upheld by the Supreme Court of Massachusetts on the ground that the subsequent portion of the provision in the Massachusetts constitution allowed the collection of excises on commodities. The term "commodity" was given a broad meaning, so broad indeed as to include everything on which a tax could be laid. The court justified its action in so construing the word "commodity" on the ground that the legislature had always so construed it since the adoption of the constitution itself thirty years ago. This was considered by the court as being sufficient evidence

to show that the framers of the constitution must have intended to give this meaning to the word "commodity."

The constitution of the State of Mississippi provides as follows:

> "Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

It will be noted that the provision requiring uniformity and equality applies to taxes generally, while the remaining provisions are limited by their terms to property taxes.

The constitution of the State of New Hampshire gives the General Court power

> "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within, the said state, and upon all estates within the same."

Under this provision of course a license tax can be imposed as, "it is a tax," as the Supreme Court of California held in the case of People v. Martin, "upon the inhabitants." Nevertheless the Supreme Court of New Hampshire held that these taxes must be uniform. State v. Pennoyer, 65 N. H. 113; 18 Atl. 878. In this case the Supreme Court of New Hampshire had before it a law requiring physicians

to procure a license and pay a stipulated amount therefor. The law did not apply alike to all physicians and was accordingly held void as lacking in uniformity.

The constitution of the State of Missouri contains the following provisions:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws.
>
> "All property subject to taxation shall be taxed in proportion to its value.
>
> "The General Assembly shall not impose taxes upon counties, cities, towns, or other municipal corporations or upon the inhabitants thereof or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities the power to collect and assess taxes for such purposes."

It will be noted that this constitution, like practically all the other constitutions, and unlike the Alaska organic act, contains two separate provisions, one applying to taxes generally and the other to property taxes only. It is similar to the Alaska organic act in that all taxes are required to be uniform upon the same class of subjects. It differs from the Alaska organic act in that under it all property sub-

ject to taxation shall be taxed in proportion to its value, while under the Alaska provision "all" taxes must be assessed according to the value of the thing which is the subject of taxation. This constitutional provision is construed by the courts so as to carry out the meaning so clearly expressed and license taxes are included within the provision, where taxes generally are referred to and are required to be uniform upon the same class of subjects.

In the case of City of St. Louis v. Spiegel, 2 S. W. 839, it was held that license taxes must under the Missouri constitution be uniform upon the same class of subjects. An ordinance had been passed by the City of St. Louis providing for a license tax of $25 on meat shops situate in one part of the city and $50 on meat shops situate in another part of the city. It was held that this license tax violated the constitutional provision requiring uniformity.

The constitutional provision providing that the legislature shall not tax counties, cities, etc., or the inhabitants or property thereof, for county, city, town or other municipal purposes, is in all respects like the provision upon that subject contained in the California constitution, and the Supreme Court of Missouri placed thereon the same construction previously placed on a similar provision by the Supreme Court of California. State Ex Rel Wyatt vs. Ashbrook 72 Am. St. Rep. 765.

It was claimed in this case that an act of the

Missouri legislature requiring a license tax from department stores was void for two reasons. First that the legislature had no power to pass the law since two-thirds of the revenue derived under it was paid into the city treasury, the law being therefor designed to raise revenue for municipal purposes and being imposed upon the inhabitants of the cities. And for the further reason that it lacked uniformity in that it applied only to department stores. The Supreme Court of Missouri held that the act violated the constitution in both respects. This decision, like the decision by the Supreme Court of California, is important in that it is held that the term "tax" when used in the constitution includes license taxes unless it is expressly restricted to property taxes. As in California the tax therein prohibited was any tax on the inhabitants or property. In Alaska the term used is "all taxes" which is equally comprehensive.

The constitution of the State of Nevada provides as follows:

> "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory."

This provision by its terms requires no more than a just valuation for taxation of all property, real personal and possessory, and has of course no application to license taxes.

The constitution of the State of New Jersey provides as follows:

> "Property shall be assessed for taxation under general laws and by uniform rules according to its true value."

This provision also is limited in its application to the taxation of property.

The constitution of North Dakota provides as follows:

> "laws shall be passed taxing by uniform rule all property according to its true value in money."

The terms of this provision also expressly apply to the taxation of property only.

The constitution of the State of Ohio provides as follows:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money;"

It will be observed that the provisions in the Ohio constitution are such that they apparently relate to property taxes only yet the Ohio courts have persistently justified non-uniformity in connection with money exactions for licenses on the ground that they were exacted under the police power, indicating thereby that exactions under the taxing power would be required to be uniform.

The Ohio decisions are reviewed in the opinion

in the case of Pittsburg, C. & St. L. R. R. Co. v. State, 30 N. E. 435. An act passed by the Ohio Legislature required every corporation or company operating a railroad or any part of a railroad within the state to pay to the Commissioner of Railroads and Telegraphs a fee of $1.00 per mile for each mile of track operated by it within the state. The constitutionality of this act was assailed on the ground that it levied a specific tax on property. It was contended that the money sought to be collected was a fee and not a tax and did not come within the constitutional inhibition. In support of this contention, it was urged that the Supreme Court of Ohio in a previous decision had held that a license fee exacted from gas companies did not come within the constitutional inhibition requiring uniformity. The Supreme Court of Oho reviewed this early decision indicating that the gas business was a business that required police supervision; that the law imposing the exaction upon the gas companies provided for numerous kinds of regulation and that the license fee required from the gas companies was required in order to pay the cost of this regulation under the police power. It was further shown that the decision of the court in that case was based upon that ground and the law sustained as an exercise of the police power. The court then proceeded to apply this theory of the law to the facts in the case. It was pointed out that the law under consideration did not provide for any regulation and that the exaction of

$1.00 per mile was a tax pure and simple and that its nature as a tax was not affected by the fact that it was called a fee. The court say: "A tax is a pecuniary burden imposed for the support of the government Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes. The money raised by this section under consideration is directed to be paid into the state treasury; it becomes a part of the funds of the state applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the act to which it is supplementary, to indicate a purpose that the fund raised shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish, being to create a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax. It bears no resemblance to, and should not be confounded with, that class of laws enacted by the legislature, the immediate object of which is to call into active operation the police powers of the state, but which, incidentally or indirectly, may cause the production of public revenue."

The constitution of the State of Oregon provides as follows:

> "No tax duty shall be imposed without the consent of the people or their representatives in

the Legislative Assembly; and all taxes shall be equal and uniform.

"The Legislative Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal"

It will be observed that the only provision in the Oregon constitution that applies to all taxes is the provision requiring equality and uniformity. The other provisions are expressly limited in their applicaton to taxaton of property, real and personal. All that would be required of a license tax under this provision is equality and uniformity. Taxes on property, however, both real and personal are required to be in accordance with a just valuation.

In deciding the case of Ellis v. Frazier, 63 Pac. 642, the Supreme Court of Oregon was called upon to pass on the validity of a tax under the Oregon constitution. A law had been passed by the Oregon legislature requiring the owners of bicycles to pay a tax of $1.25, whereupon they were furnished with a tag indicating that the tax had been paid, which was to be attached to the bicycle for and on account of which it had been collected. It was contended that this was an exaction that did not come within the constitutional inhibition. But the court held it was a tax and that for that reason it was void as lacking uniformity since bicycle owners in certain

counties only were required to pay it. And furthermore that it was a property tax and for that reason violated the constitutional inhibition that property taxes must be ad valorem or assessed according to value. In passing upon this question the Supreme Court of Oregon say: "As a preliminary matter, it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license; for, if the latter, it is not inhabited by the provisions of the organic act relied upon, the courts generally holding that the constitutional requirement as to uniformity of taxation has no reference to the taxation of occupations." (It must be noted that the Supreme Court of Oregon used the term "license" and the term "occupation tax" interchangeably as referring to exactions under the police power and not to exactions under the taxing power; that what is usually spoken of as a license tax is not included within the meaning of either of the terms as used by the Oregon Supreme Court. This is evident from the context.) Continuing the court say: "The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant; for the object sought to be attained by the enactment must determine the character of the exaction. 'The distinction between a demand of money, under the police power, and one made under the power to tax,' says Judge Cooley, 'is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially dif-

ferent. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power.' Cooley, Tax'n. 396. It was held, in the case of In re Wan Yin (D. C.) 22 Fed. 701, that whenever it is manifest that the fee for a license to conduct an occupation is substantially in excess of the sum necessary to cover the cost of issuing the license and the incidental expense attending the regulation of the business, the burden is a tax, and not a license." The court then proceeded to review other similar cases and continuing say. "Whatever the rule may be in respect to the granting of licenses which incidentally result in producing a revenue, or the law in relation to the authority of a municipal corporation in the maintenance of its streets, it cannot reasonably be inferred that the burden imposed by the act in question was an exercise of the police power of the state; for the use of a bicycle does not necessarily tend to the destruction of the highways. We do not wish to be understood as intimating that the sum of one dollar more than the cost of executing the necessary receipts and supplying the requisite tags is an unreasonable exaction, but, inasmuch as that sum is set apart from each collection as a fund for the purpose of constructing and maintaining bicycle paths, it is evident, we think, from a consideration of the entire act, that it was primarily designed as a means of raising revenue, and the bur-

den thus imposed must therefore be treated as a tax, and not a license." It was then held that since bicycles differ greatly in value, the tax violated the provision requiring uniformity and equality. The court say: "The value of all bicycles not being the same, the tax of $1.25 upon each destroys the required uniformity in the assessment, and renders the rate of taxation unequal, so that the tax in this respect violates the constitutional provision above quoted." As has been elsewhere shown in this brief the act was also held to violate the constitutional provision that property must be taxed according to value, the court holding that this tax was in fact a tax on the property itself.

Later on the Supreme Court of Oregon had occasion to pass upon an act of the legislature more or less similar in character, Reser v. Umatilla County, 86 Pac. 595. In this case the court had before it an act which required the nonresident owners of sheep bringing sheep into the state for pasturage or for the purpose of driving such sheep through the state, to pay a tax of a fixed sum per head. It was urged by the Attorney General that the exaction was made under the police power of the state and was not therefor subject to the limitations imposed by the constitution with reference to the collection of taxes. But the court held the exaction to be a tax and held the tax void as lacking in uniformity and as having been levied without regard to valuation. In the course of the opinion it is said: "It is some-

times difficult to distinguish between a tax and a license. Generally speaking, a tax is a charge or burden imposed on persons or property for the support of the government or for some specific purpose authorized by it. Its object is to raise revenue. A license, however, is a permission to do what would otherwise be unlawful. The fee or charge often exacted therefor is in law supposed to cover the cost of issuing the license and the expense incident to regulating and controlling the business, although it may ultimately result in a source of revenue. To relieve a law, imposing a burden or tax upon persons or property, from the operation of the constitutional provision relative to taxation, it must have for its primary object the granting of some privilege or the imposing of some restraint."

It will be noted that in each of these cases the law before the court levied a specific tax on property. Such taxes in common with all other taxes were required by the constitution to be equal and uniform, since the clause requiring equality and uniformity applied to all taxes alike and being property taxes they were required to be assessed according to value, since by the provisions of the constitution property taxes are required to be so assessed. However, since the constitutional provision requiring assessment according to value is expressly limited in its application to property taxes, there would seem to be no good reason why a license tax could not be collected in Oregon if such tax were equal and uni-

form unless the view were adopted expressed by the Supreme Court of the United States in the case of Welton v. State that these taxes on business were in effect a tax on the property employed in connection with such business. The Supreme Court of Oregon seems to have taken this view of the matter, for while the taxes before the court were not license taxes, but specific property taxes, the opinion in each case contains a discussion of the validity of specific taxes generaly including license taxes and leads to the conclusion that under the Oregon constitution no money can be exacted except in the form of ad valorem property taxes unless the exaction be made in the exercise of the police power of the state.

The constitution of the State of Pennsylvania provides:

> "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

This constitution contains no provision requiring assessment according to value, the only provision contained being one requiring uniformity upon the same class of subjects and this, like the provision in the Alaska Organic Act, applies to all taxes alike. Accordingly it is held by the Supreme Court of Pennsylvania that occupation or license taxes come within its requirements and must be uniform. Banger's Appeal 109 Pa., St. 79.

In this case the court had before it an ordinance

of the city of Williamsport under which it was sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. The ordinance was held to be invalid on two grounds: First, that the tax was in fact the income tax and that while the city of Williamsport had authority to levy occupaetion taxes, it had no authority to levy income taxes. Second, that the constitution of the state required all taxes to be uniform upon the same class of subjects; that the tax in question, regardless of its character, was not uniform upon the same class of subjects and was therefore void as failing to comply with this constitutional requirement. The court, discussed at some length the manner in which occupation taxes could be levied so as to comply with the constitutional requirement of uniformity and the reason why the tax before the court did not answer this requirement. In referring to the opinion expressed by the lower court to the effect that the tax complied with the requirement of uniformity, the Supreme Court say: "These views of the learned court are well enough as far as they go, but they do not come to the proper standard of uniformity. However, they might have been regarded prior to the adoption of the present constitution. They do not conform to the requirements of the organic law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes, but that upon persons and classes the tax shall be uniform."

The constitution of the State of South Dakota provides as follows:

> "All taxation shall be equal and uniform. All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money."

It will be observed that the constitution contains a uniformity clause that applies to all taxes alike, while the clause requiring taxation according to value is limited by its terms to taxes on real and personal property. It was accordingly held by the Supreme Court of South Dakota that since the clause requiring equality and uniformity applied to all taxation, license taxes must be equal and uniform. In Re Watson 97 N. W. 465. In this case the court had before it a law requiring a license tax from peddlers, exempting peddlers of nursery stock and other classes of peddlers from its operation. It was contended that this tax lacked uniformity and was therefor obnoxious to the constitutional provisions requiring uniformity in the case of all taxation. On the other hand it was argued that in some jurisdictions the uniformity clauses were not applied to license taxes. The Supreme Court of South Dakota however held that such contention could not be maintained under the provision of the constitution of that state, which did not expressly limit the requirement of uniformity to property taxes, but provided that all taxes must be uniform. In reference to this matter the court say:

"Such position cannot be taken in this state. The clause 'and all taxation shall be equal and uniform', found in the Bill of Rights, cannot be ignored. Constitutions are supposed to be prepared with much care and deliberation. It will not do to assume that such important instruments contain any idle or meaningless phrases. On the contrary, it must be presumed that every word was advisedly selected, inserted for a purpose, and intended to have its due weight in determining what organic principles have been established. In this state, then, taxes on occupations must be equal and uniform."

The constitution of the State of Washington provides as follows:

> "all property in this state, not exempted under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

It will be observed that each and every provision contained in this constitution relative to taxation is expressly limited by its language to property taxes and can therefore have no possible application to

license taxes under the view taken by the state courts that those taxes are not taxes on property.

The constitution of the state of Wyoming provides as follows:

> "No tax shall be imposed without the consent of the people or their authorized representative. All taxation shall be equal and uniform. All property, except as in this constitution otherwise provided, shall be uniformlly assessed for taxation and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

It will be observed that the constitutional requirement of equality and uniformity in Wyoming, as in South Dakota, applies to all taxation, while the provision requiring taxes to be assessed according to value is expressly limited to property taxes. There is therefore nothing in the constitution to prevent the exaction of license taxes provided they are equal and uniform.

In the case of State vs. Willingham, 9 Wyo. 290; 62 Pac. 797, a city ordinance was attacked on the ground that the license tax required was not uniform and was therefore in conflict with the constitution. The court reviewed the provisions of the ordinance and held that the tax imposed was in fact a uniform tax and satisfied the constitutional provision.

The constitution of the state of Wisconsin provides as follows:

> "The rule of taxation shall be uniform and taxes shall be levied upon all property as the legislature shall prescribe."

This constitutional provision is rather indefinite. Its effect was considered by the Supreme Court of Wisconsin in the following cases: Fire Department of Milwaukee v. Holvanstein, 16 Wis. 136; Morrill v. State, 38 Wis. 428; State v. Whitcom, 122 Wis. 110; 99 N. W. 468.

In the case of Fire Department of Wilwaukee v. Halvanstein, the court passed upon the validity of a law requiring foreign insurance companies to pay a per cent. of their premiums for the benefit of the fire departments of some of the cities. It was contended that this was a tax and void since it lacked uniformity. But the Court held that the exaction was not a tax but a fee exacted by the state in the exercise of its police power and that the law was no more than a police regulation. The court say: "Nor is the requirement an exercise of the power of taxation as to the companies, but only a proper exercise of the police power inherent in the sovereignty of the state."

The decision in the case of Morill v. State relates to the validity of an act of the state legislature requiring hawkers and peddlers to take out a license and pay a fee therefor. It was claimed that this was an exercise of the taxing power and that for

that reason the fee must be uniform. The court however held that the legislature had the authority under the police power to prohibit hawking altogether, and had the undoubted power to regulate its exercise, because hawking and peddling were regarded as unsavory lines of business. It was accordingly held that the act in question was enacted under the police power for the purpose of regulation and was not governed by the constitutional inhibitions relating to taxation. After quoting from Jacob's Law Dictionary, where hawkers are defined as deceitful fellows etc., and making the statement that it was not the intention to cast any reflection upon the parties before the court, in view of the fact that many honest men were in the business of peddling, the court say: "but with this disclaimer we must be permitted to add that undoubtedly resort is often had to this business for the sole purpose of obtaining admittance, which could not otherwise be obtained into private dwelling houses in furtherance of some criminal or unlawful object. This is another reason where the restriction or regulation of the buisness is an exercise of police power." This case was afterwards appealed to the Supreme Court of the United States as reported in the 154 U. S. 626. The judgment of the Supreme Court of Wisconsin was reversed. The Supreme Court of the United States do not discuss the case in the opinion any further than to say it was reversed on the authority of Welton v. State.

The decision in the case of State v. Whitcom deals with the validity of an act passed by the Wisconsin legislature requiring peddlers to procure a license and pay a fee therefor. Veterans of the Civil War and a number of others were exempted from the operation of the act. The court referred to two former cases decided by it, which leave the question as to whether a license tax could be exacted under the provisions of the Wisconsin Constitution in doubt and in view of the fact that that matter had not been argued in this case and the further fact that an expression on it was not necessary to the decision, the court refused to pass on it.

It was held that it was immaterial whether the license fee required under this law were viewed as a tax or an exaction under the police power, as in either event the law would be void. If viewed as a tax it could not be sustained unless it was uniform upon the same class of subjects. If viewed as an exaction under the police power, it could not be sustained since it denied the equal protection of the laws, even though its object was to protect the public against irresponsible and deceitful traders. In the course of the opinion the court say: "In considering the exemptions or partially disabled veterans of the civil war a quite unanswerable question arises, why, whether for purpose of taxation of police, they should be exempted any more than equally disabled veterans of other wars." And further on in the opinion it is said: "It seems neither necessary

nor wise to carry further a critical anlysis of this statute. We have pointed out several respects in which it fails to impose its penalties upon persons not distinguishable from the appellant by any ligitimate classification. It therefore denies him the equal protection to which, both by Federal and State constitutions he is entitled, and cannot be valid as against him whether its purpose be taxation or regulation of conduct."

None of the other state constitutions contains a provision at all similar to the provision contained in the organic law of Alaska. A review of the various constitutional provisions limiting the power of taxation and the decisions thereunder discloses the fact that the courts have construed these provisions just as they were written. In many of the state constitutions the provision relating to uniformity is not by its terms limited to property taxes, but like the Alaska provision is so worded as to apply to all taxation alike, and wherever such is the case it will be observed that the courts have generally, if not universally, held that the provision related to all taxation regardless of the character of the tax and that license taxes in order to be valid must be uniform in compliance with the constitutional provision.

It will be noted that no state constitution contains a provision similar to that found in the Alaska Organic Law providing that "all taxes" must be assessed according to value. The provisions in all the state constitutions requiring assessment according

to value are expressly by their terms limited to taxes on property, and being so limited, the provisions can not and do not become material in discussing the validity of a license tax. But in the case of these provisions the courts also have given them effect according to, and construed them in accordance with, the exact language employed. While the language employed differs more or less in each case all these provisions provide substantially that property taxes shall be levied according to the value of the property taxed. And wherever a provision of this character exists the courts have held that the power of the legislature in connection with the assessment of property taxes is limited to taxes assessed according to value. That is to say, all specific property taxes are done away with and such taxes are in all cases required to be ad valorem.

Since the decisions of the various state courts under these varying constitutional provisions do no more nor less than construe these provisions in accordance with the exact language employed, they do not and can not furnish any authority under which a construction can be placed upon the provisions of the Alaska Organic Act, which is not in accordance with its exact language. The Organic Law of Alaska provides that "all taxes" shall be uniform upon the same class of subjects. In this respect it is similar to the organic law of many of the states. The provision applies to all taxes. No distinction is made between license taxes and property taxes. It refers

to "all taxes," that is to say, each and every kind of a tax and since a license tax is a tax, it must, in order to be valid, conform to the requirement of uniformity, and this is in accord with the decisions of the state courts rendered under similar constitutional provisions. But the provision in the Alaska Organic Act does not stop here, it requires more than uniformity. The language is, "all taxes shall be uniform upon the same class of subjects and the assessments shall be according to the actual value thereof. Under this provision then all taxes must be based upon an assessment and this assessment must be according to the actual value of the thing which is the subject of taxation. No state constitution contains the provision that all taxes must be assessed according to the actual value of the thing taxed. This provision is peculiar to the Alaska Organic Law. Many state constitutions provide that all property taxes shall be levied according to actual value, but none, that *all* taxes shall be so levied, or that any tax, other than property taxes, shall be so levied. Apply the rule of decision applied by the state courts under the provision that all taxes must be uniform to the provision in the Alaska Organic Law. It follows that all taxes which are not assessed according to the actual value of the thing taxed are void, for as was pointed out in discussing the uniformity clause, license taxes are taxes, and being taxes are embraced within the term "all taxes" which is at once the most comprehensive and the

most all inclusive of any term that Congress could have employed. If this language does not include license taxes, it is difficult to conceive of any language that would have been broad enough to include them. The statement contained in the Alaska Organic Act is equivalent to the statement that no tax shall be collected which is not uniform upon the same class of subjects, and which has not been assessed according to the actual value of the thing taxed, and since no tax, except an ad valorem property tax, can conform to these provisions that is the only tax that can be levied and collected under the Alaska Organic Law. It may here be added that the ad valorem system of taxation is the only safe, reasonable and just system. Under it property is taxed and not the use of it. Unlike the license tax system, it does not place a premium upon idleness at the expense of industry and where it is levied with uniformity it distributes the burden of taxation equally and fairly.

It is urged that the provision requiring assessment according to value can not have been intended to apply to license taxes because these taxes can not be assessed according to value. It is true that license taxes cannot be assessed according to value, but it does not follow that for this reason they can be levied under a provision in the Organic Law requiring "all taxes" to be assessed according to value. It simply follows that license taxes can not be imposed. To contend otherwise leads to the most ridiculous conclusions for if license taxes can be assessed under

this provision for the reason that its terms are such that a license tax can not conform to it, then it must follow that any tax can be assessed which is of such character that it can not conform to the requirements of the provision and can not be brought within its terms.

A specific property tax which differs from a license tax only in that it is a specific tax on property whereas the latter is a specific tax on occupations, can not be made to conform to the requirements of this provision, for while it is a tax on property it is a tax of so much per article without reference to the value of the article, just as an occupation tax is a tax of so much on a given occupation without reference to the value of the occupation. It is this that makes it a specific tax. If a specific tax were made to conform to the constitutional requirement so as to be assessed according to value, it would cease to be a specific tax and become an ad valorem tax. No specific property tax therefor can conform to this requirement. Hence, if the provision is to be so construed as not to apply to taxes that can not be made to conform to it, specific property taxes are not within its terms and can be levied notwithstanding a provision that "all taxes" must be according to value.

What is said of specific property taxes is true of each and every kind of a tax, except an ad valorem property tax, for no tax except an ad valorem tax is assessed according to value. If therefore all kinds

of taxes that can not be made to conform to this provision are to be considered as not coming within it and are to be allowed notwithstanding the fact that they are not assessed according to value, then any kind of a tax whatsoever, be its character what it may, may be levied notwithstanding the fact that it is not assessed according to value. That is to say, since no tax, except an ad valorem property tax, can be levied according to value, specific property taxes, license taxes and every other conceivable kind of a tax may be levied notwithstanding the constitutional provision that all taxes must be levied according to value, if it be conceded that the requirement of assessment according to value was not intended to apply to taxes that are of such a character that they can not be made to conform to it. The adoption of this view therefore would entirely destroy the effect of the provision. It would be equivalent to saying that a provision that taxes must be assessed according to value applies only to ad valorem property taxes for these are the only taxes that can be made to conform to this provision. All taxes, if this contention is regarded as sound except ad valorem property taxes can of course be levied because these can not conform to the provision and ad valorem property taxes can of course be levied because these can not exist without conforming to the provision, so the provision becomes entirely meaningless and is left without any effect whatsoever.

The idea that the term "all taxes" does not in-

clude license taxes finds its origin in a wrong conception of what a license tax really is. It results from a confusion of license fees exacted under the police power with license taxes. There is nothing occult or mysterious about a license tax. It is not different from any other kind of a tax, it is simply a specific tax upon occupation, just as a specific tax on property is a specific tax on property. Money exactions under the police power may be allusive and peculiar in character because of the elasticity of the police power, but these characteristics do not apply to license taxes.

Viewed therefor from the stand point either of reason or authority, the term "all taxes" must be held to include license taxes and since the tax sought to be collected in this action is not uniform upon the same class of subjects and is not assessed according to the actual value of the thing which is the subject of taxation, the tax is void and cannot be collected.

But the learned trial judge expressed the opinion that express authority had been conferred upon the legislature to exact a license tax. If such express authority exists it must exist because of the following provision in the organic act:

> "That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-

bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seven, nineten hundred and five, and the several acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

In the first place it will be observed that this provision does not contain a grant of power. The provision taken as a whole is a limitation upon the power of the legislature. Congress had enacted a law with a view of collecting revenue to meet the expense of the general government in administering the law in the Territory. It was deemed desirable to keep this law in force accordingly a provision was inserted against its repeal by the Territorial legislature. But in order that this provision might not be given a broader construction than was intended for it, it was provided:

> "That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

The clause does not in any sense contain a grant of powers but is a mere statement inserted to pre-

vent a provision containing a limitation upon the powers of the legislature from receiving too broad a construction.

Viewed, however, as an express grant of powers this clause does not confer the power to impose a license tax. A grant of power to require licenses authorizes the exaction of licenses under the police power for the purpose of regulation, but does not authorize the exaction of license taxes under the taxing power. The right to require the latter exists if it exists at all under the taxing power and must be exercised in subordination to the limitations placed upon that power by the organic law, the former exists under the police power and is controlled by the limitations placed upon that power by the organic law, without any reference whatsoever to the limitation relating to the exercise of the taxing power. The right to require a license and the right to impose a license tax are separate and distinct rights, bearing no relation to one another; and a grant of the former does not include the latter. Upon this the authorities are agreed.

Sunset Telephone and Telegraph Co. v. City of Medford 115 Fed. 202.
In re Laundry Licenses 22 Fed. 701.
Clark vs. Brunswick, 43 N. J. Law 175
Cache County v. Jensen 61 Pac. 303.
State v. Smith 35 Atl. 506 (Conn.) 52 Am. St. Rep. 301.

The case of the Sunset Telephone and Telegraph

Company v. City of Medford arose before Judge Bellinger. The charter of the City of Medford, Oregon provided as follows:

> "The city council shall have power to license, regulate or prohibit telegraph and telephone companies using the roads, streets, or alleys of the city and road district, and to fix the compensation which such companies shall annually pay to the city for such license or privilege. But no license shall grant an exclusive right to any such company."

Under this provision in the charter the city passed an ordinance requiring telephone companies to pay one hundred ($100.00) dollars per annum as a license fee. The court held that the fee was so large that it was obviously a revenue provision and that it was therefore not within the authority conferred on the city by its charter. In passing upon the ordinance Judge Bellinger says:

> "The ordinance complained of provides that no person shall engage in the telephone business, or place in or occupy any of the streets with its poles and wires, without paying, for an annual license so to do, the sum of $100, and, when this sum is paid, the city recorder shall issue a license to the person, authorizing and permitting said person or company to engage in the telephone business within said city for the period of one year; that the person or com-

pany paying said license fee, during the year for which they have paid such license, shall have a right to occupy the streets and alleys with his or its poles and wires, etc. This is a revenue provision, and is not within the authority conferred upon the city by its charter. 'The power to license, as a means of regulating a business implies the power to charge a fee therefor sufficient to defray the expense of issuing the license, and to compensate the city for any expense incurred in maintaining such regulation. Whenever it is manifest that the fee for the license is substantially in excess of what it should be, it will be considered a tax, and the ordinance imposing it void.' Laundry License Case (D. C.) 22 Fed. 701. If the city has authority, under section 102 of the charter, to fix the compensation which shall be annually paid for such license or privilege to use the roads and streets of the city, then the city might have required the payment of the sum fixed by the ordinance for such use. But it did not do this. From the averments of the bill, it appears that the complainant has the right to use the streets of the city, by permission of its lawfully appointed officers. If so, the city cannot add new conditions to the grant after the company has accepted it and established its plant. If by the power to fix compensation is meant the compensation that the city is to receive for the license

regulation, the case is within the rule of the Laundry License Case (D. C.) 22 Fed. 701, and the compensation to be fixed must not go beyond the expense of issuing the license and maintaining the license regulation. In short, the city cannot add to the conditions upon which the right to use the streets was granted to the complainent, and while it may exact compensation for the license, it cannot, under the power given in its charter, make such compensation a matter of revenue."

The case of In Re Laundry License arose in Oregon. A city ordinance of the City of Portland required the proprietors of wash houses to pay a quarterly fee of five dollars, making an annual fee of twenty dollars. The charter of the city of Portland authorized the city to regulate wash houses, laundries, and the like, and another subdivision in the charter authorized the city to license and regulate all such callings, trades and employments not prohibited by law, "as the public good may require." The question before the court was whether these provisions in the charter authorized the license fee of twenty dollars per annum exacted from the proprietors of wash houses. The matter arose on a petition for a writ of habeas corpus. The petitioner had been convicted for violation of the Portland ordinance and, the case arose before Judge Deady. Judge Deady held that the city had under the provision quoted the power to license laundries, but that a license could

be exacted only in connection with the exercise of the power to regulate, and that it could not be used as a pretense for raising revenue. The Court held that one dollar per year would be ample to re-imburse the city for registering a license and that the fee of twenty dollars must be regarded as a revenue measure and therefore void.

The case of Clark v. New Brunswick arose in the State of New Jersey. The city charter of the city of New Brunswick empowered the city council to pass ordinances to license and regulate cartmen, hawkers, peddlers, auctioneers, pawnbrokers, junk and shop keepers and others. Under this grant of powers the city council of New Brunswick passed a license law very similar to the act passed by the Territorial Legislature. The act was held void on the ground that the power to exact a license tax was not conferred upon the city. In passing upon this matter, the court, speaking through Judge Van Sychel say:

> "Under such grant of power it has been repeatedly held in this state, the right of taxation for revenue purposes is not conferred. It is purely a police power and must be exercised for the purpose of regulation. The city may be incidently benefited by the imposition of fines and penalties, but they must be reasonable and appropriate to the regulation of the various pursuits enumerated. Any attempt to establish a fiscal scheme under the grant is without

authority by law." Again the court quoting with approval from a former decision rendered by the Supreme Court of New Jersey say: "When authority is given to require the possession of a license as a condition for selling, a reasonable fee, to cover probable expense can be demanded, but the exaction of sums in excess of such expenses and graduated by the amount of business done can be nothing else than a tax upon such business."

The case of Cache County v. Jensen arose in the State of Utah. The laws of the state authorized counties to require licenses for the purpose of regulation and revenue. Cache County imposed a license on those engaged in herding sheep. The amount of the license fee exacted depended upon the number of sheep and was so large that it was evidently intended as a means of raising revenue. The ordinance requiring the license did not provide for any regulation so that it was on its face a revenue measure solely.

The Supreme Court of Utah held that under a grant of powers to the counties empowering them to require a license for the purpose of regulation and revenue, the counties had no right to require a license for the purpose of revenue only; that the grant merely empowered the counties to license for the purpose of regulation and that if revenue resulted incidently this was permissable.

The Court say: "So a right to license a busi-

ness or occupation does not imply a right to exact a tax merely for revenue and where the object is revenue the power to license for that purpose must be conferred in unequivocal terms. "License" in general implies privilege and regulation and the imposition of it falls within the police power of the state.

In the case of State v. Smith, the court had before it an ordinance of the City of Bridgeport. The charter of the City of Bridgeport authorized the city to license cartmen, trucknen, hackmen, butchers, bakers, petty grocers, hucksters and common victualers under such restrictions and limitations as said common council might deem necessary and proper to the health of the city, and to make other ordinances relative "to any and all subjects which shall be deemed necessary and proper for the protection and preservation of the lives of the citizens." The city council under this grant of power enacted an ordinance requiring a license from all milkmen. The court held that this ordinance was not authorized, under the general welfare clause, nor under the provision above referred to and was therefore void. The court say:

> "The right to license the pursuit of a lawful business, which as usually carried on does not endanger the public health or safety, and thus to limit the number of those who may engage in it, is one of the highest powers of sovereignity. When conferred upon a municipal

corporation, the grant can not be extended by any doubtful implication."

IV.

THE ACT OF JUNE 1906 PROVIDES THAT TAXES PAID THEREUNDER SHALL BE IN LIEU OF ALL OTHER TAXES AND LICENSES

One further proposition remains to be considered. In June of the year 1906, Congress passed an act relating to the fisheries of Alaska. The act covers the whole subject of fish and fisheries and contains many provisions relating to the protection of the fish, and contains, among others, the section set out at length in this brief. This section provides for the payment of certain taxes on the business and output and it is provided that these shall be in lieu of all other license fees and taxes therefor and thereon. The Organic Act provides that the authority of the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the game, fish and fur-seal laws. After enumerating a number of other laws to which this authority of the legislature shall not extend, the Organic Act contains this proviso: "Provided further that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses." None of the other laws mentioned in the enumerated list contains a provision that the taxes paid thereunder shall be in lieu of all other taxes

and licenses, so that other taxes and licenses might be exacted without amending, modifying or repealing such law.

No act of the Territorial Legislature makes any reference to this act of June 1906. No express attempt is made to either modify it, amend it, or repeal it. Whether the legislature had, or had not, the power therefore to repeal, modify or amend this act of Congress relating to the fish and fisheries, it is sufficient for the purpose of this case that it did not attempt to do so. Nor can it be said that the provisions of the act of Congress were repealed by necessary implication, when the act of the first Territorial Legislature, the validity of which has been discussed in this brief, was adopted.

Aside from the fact that courts do not favor a repeal of laws by implication, the provisions of the act of the Territorial Legislature are so indefinite and uncertain that it is indeed difficult to say whether the legislature had any real, well defined intention at all when the law was adopted. Clearly under the express provisions contained in the Organic Act, whether the Legislature had or had not the power to repeal the provision that the taxes paid under the Act of Congress should be in lieu of all other taxes and licenses, it should not be held to have exercised this power by doubtful implication, or unless it clearly did so in express terms, but the Act of the Legislature should be confined in its operation to such cases, if any there be, as are not

affected by and do not come within the provisions of the Act of Congress. And since the business of the plaintiff in error is such that it comes within the provisions of the Act of Congress and since it has paid the taxes due thereunder it should not now be required to pay any further or additional taxes.

For the various reasons assigned, the judgment of the lower court should be reversed. The act of the Legislature creates no civil liability, nor is a civil remedy provided and the act itself is void in that it requires the doing of that which is impossible and is so indefinite and uncertain in its provisions that it can neither be complied with nor enforced and in that it confers upon the court or judge arbitrary power to deny to those engaged in useful occupations the right to follow such occupations and to deny persons possessed of property the right to use and enjoy such property, in violation of the provisions of the Federal constitution; in that the tax sought to be imposed by the act is not uniform upon the same class of subjects, is not based upon an assessment and is not assessed according to value, in violation of the provisions of the Organic Act of the Territory of Alaska in that regard, and the plaintiff in error having paid its taxes under the act of Congress enacted in June, 1906, paid the same in lieu of all other taxes and licenses.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff in Error.

No. 2731

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed
JAN 31 1916
F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

HELLENTHAL & HELLENTHAL, Juneau, Alaska,
Attorneys for Plaintiff in Error.

J. H. COBB, Juneau, Alaska,
Attorney for Defendant in Error.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Complaint.

The above-named plaintiff complaining of the above-named defendant for cause of action alleges:

I.

The defendant is a corporation duly incorporated under and by virtue of the laws of the State of Oregon and doing business in the Territory of Alaska in taking and canning salmon, and has paid its annual license tax required for doing business as a corporation, under the laws of Alaska, and has paid all its license taxes under the act of Congress of June 26th, 1906, entitled "An act for providing and regulating all fisheries in Alaska," and has in all respects complied with the provisions of said act.

II.

That the defendant prosecuted the business of fishing for and canning salmon in Alaska between August 1st and December 31st, 1913, and during said period had canned 2627 cases of Sockeye and 117,119 cases of Cohoe or Chum salmon.

III.

That by an act of the Alaska legislature [1a*] approved April 29th, 1913, there thereby became due and owing to the Territory of Alaska under and by virtue of said act the sum of 7 cents per case for the 2627 cases of Sockeye salmon and ½ cent per case upon the 117,119 cases of Cohoe or Chum salmon, being a total of $769.48, which was due and payable to the Territory on or before January 15th, 1914, but the defendant has failed and refused to take out a license as provided in the act aforesaid or to pay the license taxes due and payable under said act.

WHEREFORE the plaintiff, the Territory of Alaska, prays judgment of the defendant for the sum of $769.48, with interest thereon from the said 15th day of January, 1914, to date at the rate of 8 per cent per annum and all costs herein incurred.

And for a second and further cause of action plaintiff alleges:

I.

It repeats the allegations of paragraph I hereof the same as if they were herein set out in full.

II.

That during the year 1914, the defendant engaged

*Page-number appearing at foot of page of original certified Record.

in the business of taking and canning salmon in Alaska; that during said year it canned 72 cases of King salmon, 27,158 cases of Sockeye and 116,558 cases of Cohoe or Chum salmon.

III.

That by the terms of the act of the territorial legislature approved April 29th, 1913, the defendant was obligated and bound to take out a license for carrying on said business and to pay a license tax thereon of 7 cents per case upon the said Sockeye and King salmon and ½ cent per case upon the said Cohoe or Chum salmon, which said tax became due and payable on or before [2] January 15th, 1915, but the defendant has failed, refused and neglected to take out said license or pay said taxes or any part thereof, and there is now due and owing the Territory for taxes for the year 1914, from the defendant for carrying on the business aforesaid, the sum of $2,488.89, with interest thereon at the rate of 8 per cent per annum from January 15th, 1915.

WHEREFORE the plaintiff, the Territory of Alaska, prays judgment in the said second cause of action for the sum of $2,488.89, with interest thereon as aforesaid and all costs herein incurred.

J. H. COBB,

Chief Counsel for the Territory of Alaska. [3]

United States of America,
Territory of Alaska,—ss.

J. H. Cobb being first duly sworn on oath deposes and says: I am chief counsel for the Territory of Alaska. I have read the above and foregoing com-

plaint and the same is true as I verily believe.

J. H. COBB.

Subscribed and sworn to before me this the 31st day of December, 1915.

[Notarial Seal] E. L. COBB,

Notary Public in and for Alaska.

My commission expires Dec. 3, 1918.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By L. E. Spray, Deputy. [4]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1416–A.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,

Defendant.

Judgment.

This cause came on regularly to be heard, upon the demurrer of the defendant to the plaintiff's Complaint, Mr. Hellenthal appearing for and Mr. Cobb against, and the Court having heard said demurrer and being fully advised in the premises, overrules the same, to which ruling the defendant then and there excepted.

And the defendant in open court announced that it did not desire leave to answer, but elected to stand upon the said demurrer, whereupon the plaintiff, by

Mr. Cobb, moved the Court for judgment, and the motion is granted.

IT IS THEREFORE CONSIDERED BY THE COURT and it is so ordered and adjudged, that the plaintiff, the Territory of Alaska, do have and recover of and from the defendant, the Alaska Pacific Fisheries, a corporation, on its first cause of action the sum of $769.48 with interest thereon from January 15th, 1914, at the rate of 8 per cent per annum, aggregating $885.05, and upon its second cause of action the sum of $2,488.89 with interest thereon at the rate of 8 per cent per annum from January 15th, 1915, aggregating $2611.40, and aggregating in all [5] $3,496.45, with interest thereon from the date hereof at the rate of 8 per cent per annum, and all costs, for all of which let execution issue.

Dated this 31st day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [6]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the defendant herein duly and regularly and within the time provided by law therefor filed its Demurrer, which is in words and figures as follows:

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,

Defendant.

Demurrer to Plaintiff's Complaint.

Comes now the defendant, and demurs to complaint of plaintiff herein on the following grounds, to wit:

I.

That the facts stated in said complaint are not sufficient to constitute a cause of action against defendant or at all.

II.

That the act of Congress dated June 26, 1906, the same being chapter 3, title 7, of the laws of Alaska relating to fish and fisheries, which said act deals with salmon fisheries and provides for payment of certain license taxes by those engaged in the business of canning, curing and preserving fish, and manufacturing fish products within the Territory of Alaska in lieu of all other license fees and taxes therefor and thereon, is still in full force and effect, neither the same nor any part [7] thereof having been repealed by

subsequent legislation, and the defendant, having paid the license tax provided thereby and therein, and having received a license in compliance with said act, said license fee and tax having been paid in lieu of all other taxes, is not subject to or liable for other license fees or taxes.

III.

That under the provisions of chapter 52 of the acts of the territorial legislature of Alaska for the year 1913, being an act entitled "An act to establish a system of taxation, create revenue and provide for the collection thereof for the Territory of Alaska and other purposes," being the act set forth in the complaint and which is relied upon as a basis and foundation for the case and action against defendant, no civil liability is created and the defendant, Alaska Pacific Fisheries, is not made by the provisions of that act, civilly liable to the Territory of Alaska for the payment of any sum whatsoever, nor does said act contain any provisions under which said Alaska Pacific Fisheries could or did become indebted to the Territory of Alaska in any sum whatsoever.

That said act merely makes it an offense to prosecute or attempt to prosecute any of the lines of business therein mentioned, without first applying for and obtaining a license so to do, making said offense a misdemeanor and punishable as provided in said act, without providing that those prosecuting or attempting to prosecute any of the lines of business for which said license is required, shall be indebted to the Territory of Alaska in any sum whatsoever.

That the provisions of chapter 76 of the acts of the

territorial legislature for the year 1915, referred to in the complaint, if construed to impose a civil liability for a tax in connection with the operation of fisheries or of canning fish prior to its enactment, is retroactive and therefore void, and is obnoxious to the provisions of the Constitution of the United States in that regard.

That no civil remedy for the collection of license taxes imposed or sought to be imposed by the provisions of chapter 52 of the Session Laws of the Territory of Alaska for the year 1913 above referred to, or for the collection or enforcement of any other obligation imposed or sought to be imposed by said act, provided for by said act, said act making it solely a criminal offense for which no remedy except such as is resorted to in the enforcement of criminal laws is provided, and that if chapter 76 of the Session Laws of the Territory of Alaska for the year 1915, referred to, is so construed as to substitute a remedy under civil procedure in place of a remedy under criminal procedure or as adding a civil remedy in addition to the remedy under criminal procedure, said act is retroactive and *ex post facto* in that regard, and void as being in conflict with and obnoxious to the provisions of the Constitution of the United States.

[8]

Further, that no liability can exist under the provisions of chapter 52 of the Session Laws for the year 1913, of the Territory of Alaska, above referred to, in view of the fact that chapter 76 of the Session Laws of the Territory of Alaska for the year 1915 repeals the same.

IV.

That chapter 52 of the acts of the territorial legislature for the year 1913, referred to in the complaint, is void, especially in so far as it relates to the matters and things referred to in the complaint herein for the reason that it was and is impossible for the Alaska Pacific Fisheries to comply with the provisions of said act, and to apply for and obtain a license as therein provided in that said act requires salmon canneries and the defendant, as an owner of such canneries, to apply for and procure a license in advance and pay therefor in advance, an amount which cannot or could not be determined until the close or after the close of the season's operations, in that the amount to be paid depends upon the number of cases of the various kinds of salmon packed during the year for which the license is obtained, making it impossible to ascertain in advance what the amount of license to be paid is, for any given year.

Further, that it would be impossible for a Court or Judge thereof to pass upon the application made by the defendant, if such application had been made in compliance with the provisions of said act, for the reason that it would be impossible for the Court or Judge thereof to determine whether the amount paid were correct or not correct, since that matter could be determined only upon the conclusion of the season's work, when the number of cases of each kind of fish had been determined upon and could be counted.

Further, that said provisions of chapter 52 of the Session Laws of the Territory of Alaska for the year 1913, in so far as they relate to matters at issue here-

in, are void because the penalty imposed is so indefinite that the Court could not pronounce judgment upon a conviction or plea of guilty, since the amount fixed as a penalty for the first offense is the amount of the license, for the second offense twice the amount and so on, the penalty for each offense depending upon the amount of the license, which it would be impossible to determine in any case unless the act had been violated throughout the entire season, in order that the amount of the pack for that season could be determined upon, and if the act had been violated for a whole season, it could not be enforced because the penalty imposed would be confiscatory and so severe as to be unusual and in violation of the provisions of the Federal Constitution in that regard.

And further, that said act is void because it would be impossible for the defendant to comply therewith in that the clerk of the court could not act as an officer for the Territory of Alaska, in receiving a license fee or issuing a license, and that the Judge could not act as a territorial officer in [9] passing upon a license.

V.

That under the averments of the complaint the defendant could not comply with the provisions of the act above referred to as chapter 52 of the Session Laws of the Territory of Alaska for the year 1913, in view of the fact that the clerk of the court did not file a bond as provided for in said act, and did not qualify to act under the provisions of said act, so as to be qualified to accept moneys or otherwise to act under the provisions of said act, in connection with the issuance of licenses.

VI.

That said act, chapter 52 of the Session Laws of the Territory of Alaska for the year 1913, above referred to, is void especially in so far as it relates to matters and things referred to in the complaint, for the reason that under its provisions defendant is compelled to make application to the District Court or Judge thereof for a license to carry on a useful business necessary to society, and to use its property, to wit, its salmon canneries, reposing in said court or Judge thereof the arbitrary power to grant or refuse said license, and giving said court or Judge thereof the power to arbitrarily or capriciously deny the defendant the right to carry on the business of canning salmon and the right to employ and use its salmon canneries in conducting the business for which the same were designed, same being a lawful and useful occupation and business.

That the provisions above referred to are an invasion of the defendant's right to private property, depriving it of property without due process of law and denying to defendant the privileges and immunities to which it is entitled under the provisions of the Constitution of the United States, and otherwise conflicts and is obnoxious to the provisions of the Constitution of the United States.

VII.

That said chapter 52 of the Session Laws of the Territory of Alaska for the year 1913 is void, especially in so far as it relates to the facts in this case, for the further reason that under the provisions of said act, a license is required not for the purpose

of regulation under police power but for the purpose of raising revenue under the taxing power and for the last-mentioned purpose only.

That under the provisions of the Organic Act of the Territory of Alaska, providing for a legislature and conferring thereon powers therein mentioned, said legislature has not the authority to impose a license tax or require a license fee for the purpose of taxation or for the purpose of raising revenue, and that the power of said legislature in the collection of taxes is limited by the following provisions: "All [10] taxes shall be uniform upon the same classes of subjects, and shall be levied and collected under general laws, and assessments shall be according to the actual value thereof," as well as by other provisions contained in the Organic Act.

That under the provisions and limitations contained in the said Organic Act, the territorial legislature has not the power or authority to impose a license tax or require the payment of license fees, for the purpose of raising revenue. That the license sought to be imposed under the provisions of chapter 52 of the Sessions Laws of the Territory of Alaska for the year 1913, above referred to, is imposed without any assessment whatsoever and without any regard to the value of the subject or thing sought to be taxed, contrary to the provisions of the Organic Act in that regard.

VIII.

Further, that the tax sought to be collected in this action is, in fact, a specific tax upon property and is imposed without regard to the value of the

property taxed, and without any assessment on the property sought to be taxed, contrary to provisions of the Organic Act.

IX.

Further that said tax is a violation of the provisions of the Organic Act in that it is not uniform upon the same classes of subjects.

HELLENTHAL & HELLENTHAL,
Attorneys for the Defendant.

BE IT FURTHER REMEMBERED that thereafter this cause came on regularly for hearing on the demurrer of the defendant so filed and the Court being fully advised in the premises overruled said demurrer, to which ruling and order of the Court the defendant, by counsel, then and there excepted, on the grounds set forth in the demurrer, as well as other grounds, including the ground that no liability exists under the facts stated in the complaint; that the act of the territorial legislature relied upon in the complaint as a basis for the alleged liability is void especially in so far as it relates to the facts set up in the complaint, for the reason that the same is in conflict with the provisions of the Constitution [11] of the United States in the particulars pointed out in the demurrer as well as in other particulars and violates the provisions of the Organic Act in the particulars pointed out in the demurrer, as well as in other particulars, which exception was then and there allowed by the Court.

Whereupon the defendant electing to stand on its demurrer, the Court entered judgment herein, to which action of the Court in so entering judgment,

the defendant by counsel duly excepted, which exception was allowed by the Court.

[Order Settling and Allowing Bill of Exceptions, etc.]

And now this matter coming on to be heard on the application of the defendant to have the above and foregoing bill of exceptions settled and allowed by the Court and made a part of the record herein, and the Court being fully advised in the premises, now settles and allows the above and foregoing as the full, true and correct bill of exceptions herein, and orders that the same be made part of the record and the Court hereby certifies that the above and foregoing bill of exceptions contains a full and complete record of the proceedings had in this cause and is signed, settled and allowed by the Court as in all respects speaking the truth and is made part of the record herein.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [12]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1416–A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Petition for Writ of Error.

To the Honorable ROBERT W. JENNNGS, Judge of the District Court for the Territory of Alaska, Division Number One:

Now comes the above-named Alaska Pacific Fisheries, a Corporation, the plaintiff in error herein, by its attorneys, Hellenthal & Hellenthal, and complains that in the record and proceedings had in the District Court for the Territory of Alaska, Division Number One, in case No. ——, the Territory of Alaska, plaintiff, and defendant in error, against the Alaska Fisheries, defendant, and plaintiff in error, and also in the rendition of the judgment in said cause in the District Court for the Territory of Alaska, Division Number One, against the Alaska Pacific Fisheries on the 31st day of December, 1915, wherein the District Court for the [13] Territory of Alaska adjudged the defendant, the Alaska Pacific Fisheries, to be indebted to the plaintiff, the Territory of Alaska, in the sum of $3,496.45, and wherein the plaintiff, the Territory of Alaska, was given judgment against the defendant, the Alaska Pacific

Fisheries, for the sum of $3,496.45 and costs, taxed at $——, manifest error hath happened to the great damage of said Alaska Pacific Fisheries, as will more fully appear from the assignment of errors filed herewith.

WHEREFORE the Alaska Pacific Fisheries prays for the allowance of a writ of error, and for an order fixing the amount of the bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 31st day of December, A. D. 1915.

HELLENTHAL & HELLENTHAL,
Attorneys for Alaska Pacific Fisheries.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [14]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
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Case No. 1416–A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Assignment of Errors.

Comes now the Alaska Pacific Fisheries, the plaintiff in error, and assigns the following errors committed by the Court in connection with the trial and rendition of judgment herein, the errors so assigned being the errors which the plaintiff in error intends to urge before the United States Circuit Court of Appeals for the Ninth Circuit, and are the errors relied upon for a reversal of the judgment herein:

First Error Assigned.

The Court erred in overruling the demurrer of the defendant herein. [15]

Second Error Assigned.

That the Court erred in entering judgment herein for the plaintiff and against the defendant.

HELLENTHAL & HELLENTHAL,
Attorneys for Alaska Pacific Fisheries.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [16]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416.

TERRITORY OF ALASKA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,

Defendant.

Order [Allowing Writ of Error and Fixing Amount of Supersedeas and Cost Bond].

This matter coming on to be heard on the petition of the Alaska Pacific Fisheries, for a writ of error, and the assignment of errors having been regularly filed with said petition, the writ of error is hereby allowed as prayed for in said petition and the amount of the supersedeas and cost bond is fixed at four thousand ($4,000) dollars, to be approved by the Court or the clerk thereof.

Dated this 31st day of December, 1915.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [17]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

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Plaintiff in Error,

vs.

TERRITORY OF ALASKA,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS that we, the Alaska Pacific Fisheries, a Corporation, as principal, and B. M. Behrends, as surety, are held and firmly bound unto the above-named Territory of Alaska in the just and full sum of Four Thousand ($4,000) Dollars to be paid to the said Territory of Alaska, its attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 31st day of December, A. D. 1915.

WHEREAS, lately in the District Court for the

Territory of Alaska, Division Number One, in an action therein pending between the Territory of Alaska, as plaintiff, and The Alaska Pacific Fisheries, as defendant, a judgment was [18] rendered against the said Alaska Pacific Fisheries for the sum of $—— and costs, and the said Alaska Pacific Fisheries having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid action and the citation directed to the said Territory of Alaska, citing and admonishing it to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty days from the date of approval of this bond.

Now, the condition of the above obligation is such that if the said Alaska Pacific Fisheries shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then and in that event the above obligation to be void, otherwise to remain in full force and virtue.

ALASKA PACIFIC FISHERIES.
By J. A. HELLENTHAL,
Its Attorney,
Principal.
B. M. BEHRENDS,
Surety.

Signed, sealed and delivered in the
H. J. TURNER.
MISS BURKLAND.

The above and foregoing Supersedeas and cost bond is hereby duly approved, not only as to form,

but also as to the surety thereon, this 31st day of December, 1915.

ROBERT W. JENNINGS,
Judge of the District Court for the Territory of Alaska, Division Number One.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. **[19]**

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco.

Case No. 1416–A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable ROBERT W. JENNINGS, Judge of the District Court for the Territory of Alaska, Division Number One, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment of a plea, which is in said District Court, Division Number One thereof, before you, between the Territory of Alaska, as plaintiff, and the Alaska Pacific Fisheries, a corporation, as defendant, a manifest error hath happened to the great prejudice and damage of the said Alaska Pacific Fisheries as set forth and appears by the petition herein,

We, being willing that error, if any hath happened, [20] should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at said place and said Circuit on or before thirty days from the date hereof that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United

States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 31st day of December, A. D. 1915.

Attest my hand and the seal of the District Court for the Territory of Alaska, Division Number One, at the clerk's office at Juneau on the day and year last above written.

[Seal] J. W. BELL,
Clerk of the District Court for the Territory of Alaska, Division Number One.

By C. Z. Denny,
Deputy.

Allowed this 31st day of December, A. D. 1915.

ROBERT W. JENNINGS,
Judge.

Service admitted this Dec. 31st, 1915.

J. H. COBB,
Chf. Counsel Ter. of Alaska.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [21]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

United States Circuit Court of Appeals for the Ninth Circuit Holden at San Francisco.

Case No. 1416–A.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY of ALASKA,
Defendant in Error,

Citation on Writ of Error.

The President of the United States to the Territory of Alaska, the Above-named Plaintiff, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty (30) days from the date of this Citation, pursuant to a Writ of Error filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, wherein the Alaska Pacific Fisheries, a Corporation, is the plaintiff in error and you, the said Territory of Alaska, are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should [22] be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 31st day of De-

cember, A. D., 1915, and of the Independence of the United States the 139th.

[Seal] ROBERT W. JENNINGS,
Judge.

Service of the foregoing citation admitted this the 31st day of Dec. 1915.

J. H. COBB,
Chief Counsel for the Ter. of Alaska.

Filed in the District Court, District of Alaska, First Division. Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [23]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1416–A.

TERRITORY OF ALASKA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Defendant.

Praecipe [for Transcript of Record].

Kindly prepare and transmit to the Circuit Court of Appeals for the Ninth Circuit copies of the following: Complaint, Bill of Exceptions, Judgment, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Bond on Writ of Error, Writ of Error, Citation on Writ of Error.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division Dec. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [24]

In the District Court for the District of Alaska, Division No. One, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

Certificate [of Clerk U. S. District Court to Transcript of Record].

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 24 pages of typewritten matter, numbered from 1 to 24, both inclusive, constitute a full, true, and complete copy, and the whole thereof, prepared in accordance with the praecipe of defendant and plaintiff in error, on file in my office and made a part hereof, in Cause No. 1416-A. wherein Alaska Pacific Fisheries, a Corporation, is defendant and plaintiff in error and Territory of Alaska is plaintiff and defendant in error.

I further certify that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and the cost of preparation, examination and certificate, amounting to Eleven and 25/100 Dollars ($11.25) has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this 31st day of December, 1915.

[Seal] J. W. BELL,
Clerk.

By ——————————,
Deputy. [25]

[Endorsed]: No. 2731. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Pacific Fisheries, a Corporation, Plaintiff in Error, vs. Territory of Alaska, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed January 7, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

Case No. 2731

United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

Reply Brief of Plaintiff in Error

Upon Writ of Error to The United States District Court of The District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
Counsel for Plaintiff in Error.

Case No. 2731

United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
A Corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

Reply Brief of Plaintiff in Error

Upon Writ of Error to The United States District Court of The District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
Counsel for Plaintiff in Error.

In response to the arguments advanced by counsel for the Territory, the following will be added to what has been said in regard to the various points in the opening brief:

1. *That the Act of the First Territorial Legislature which forms the Basis of the Present Proceeding Creates no Civil Liability.*

Counsel contends that because the fine to be assessed upon the first conviction under the Act is to equal the amount of the license, and because the fine to be assessed upon a second conviction is to be double the amount of the license, and because of the further fact that a judgment may, after conviction duly had, be entered to enforce payment of the fine, the Act creates a civil liability.

Aside from the fact that a law providing for a fine to be imposed upon the conviction of a criminal offense in no sense creates a civil liability, counsel fails to call the attention of the Court to the fact that under the provisions of this Act a third offense is punished not only by a fine, but by imprisonment as well. For the first offense the penalty is a fine equal to the amount of the license, for the second offense the penalty is a fine equal to double this amount, and for the third offense the penalty is a fine equal to three times this amount and imprisonment of not less than thirty days nor more than six months. If these fines may be recovered in a civil proceeding there is no reason why a sentence of imprisonment may not be imposed under this law in a similar proceeding.

Not only is there no difference between a fine and a term of imprisonment in that both are imposed as punishment for an offense under the law and in that neither are assessed to wipe out a civil obligation, but in the present case the liability to both fine and imprisonment arose as the result of the same unlawful act. Here is found at least one of the reasons why the Act of the First Territorial Legislature creates no civil liability and why the Act of the Second Territorial Legislature providing for the enforcement of these fines and terms of imprisonment by a civil proceeding is void.

Since this matter was fully gone over in the opening brief, it will not be further discussed here, except to reply to the further contention of counsel that the provision empowering the Court to enter judgment for the amount of the fine after conviction has the effect of creating a civil liability.

It will be noted that under the Act both natural persons and corporations are upon conviction made liable to fine and imprisonment. It is provided that after a conviction has been had and a fine has been imposed, the defendant may be imprisoned with a view of enforcing the payment of the fine or a judgment may be entered against him which may be collected as other judgments. Of course a corporation could not be imprisoned, so that a fine assessed against it could not be collected or enforced by a threat of imprisonment; accordingly the provision is added providing for the collection of a fine by entering a judgment to be collected as other judgments. The law does not provide that this

judgment may be entered in a civil proceeding, but it provides that this judgment may be entered after a conviction has been duly had and a fine imposed, and after the defendant has failed to pay this fine when imposed. This is not an unusual provision to be found in criminal statutes, and in no case does it create a civil liability. Its effect is merely to provide an additional method for the enforcement of the penalty imposed under the provisions of the act of which it forms a part.

Counsel makes the statement that a statute which merely gives a remedy to enforce an existing right is not retroactive within the meaning of the Constitution. This much is conceded, but it is contended that the Act of the Second Territorial Legislature is not such an act.

In addition to what has been said upon this subject in our opening brief, it may be added that if this act were considered as a valid act the territory would be authorized not only to recover the fine imposed for the first violation, which is the amount of the license, but also the fine and imprisonment imposed for each subsequent violation, since the act provides that each day or part of a day that a person, firm or corporation does business or attempts to do business in violation of its provisions, shall constitute a separate offense, punishable in the case of the first and second offense by fine and in that of the third offense by both a fine and imprisonment. It is not a difficult matter to imagine what the effect would be if counsel's contention were regarded

as correct.

2. *The Provisions of the Act are such That It is Impossible Either To Comply Therewith or to Enforce Them.*

Counsel makes the statement that if the defendant had attempted to comply with the law and found it impossible to do so, or if it were resisting a sentence imposed after conviction, these objections might be admissible of some argument. Counsel does not point out how one engaged in the fishing or mining business could make an attempt in one case to predict the amount of its net income a year in advance, and in the other case the number and kind of cases of fish that he might at a future time be able to catch and can. Nor does counsel point out how a conviction for a violation of the act could ever have been had or how a sentence could ever have been imposed so that anyone could ever be placed in the position of resisting such a sentence. There is no rule of law requiring anyone to attempt the impossible.

Counsel says that in reply to the argument made it is only necessary to say that many persons and corporations, including among the latter the greatest metal producer in the territory, have complied with the law and found no difficulty therein. There is nothing in the record upon this subject, nothing to show that anyone has ever complied with this law. This much is certain, that no one could comply with it unless such a one possessed the gift of prophecy. That some possessed this gift and could, therefore, comply with the law is a

proposition that will be neither admitted nor denied.

Counsel says that the greatest metal producer in the territory has complied with the law. Who this metal producer is we are not advised. All the metal producers in southeastern Alaska, including the great Treadwell mine, are under an agreement with counsel awaiting the decisions in the cases now pending before complying with the demands of the territory. Aside from these there are no metal producers in Alaska except the copper mines to the westward. The owners of these may be gifted with the gift of prophecy, but it would seem unfair to blame the operators of the fisheries and the quartz mines for not being similarly qualified to look into the future. These may, like Tennyson, look into the future as far as human eye can see, but the extent of the income to be derived from as fickle a business as mining, and the extent of a fish pack, depending upon such an uncertainty as one's ability to catch fish, is beyond their range of vision.

Counsel says that all that is necessary under the Act of the Territorial Legislature "is to apply a little common sense and reason to it and it is perfectly easy to see that in the cases in which the amount of tax is made to depend upon the operations of the line of business during the year for which the tax is laid, it shall be calculated and paid at the end of the year, though the Legislature did not expressly so provide." The difficulty with applying this method of payment, however, lies in the fact, not only that the Legislature did not expressly provide for it, but in the further fact that the

Legislature has expressly provided against it.

Section 3 of the Act provides:

> "That any person, corporation or company doing or attempting to do business in violation of the provisions of this Act, *or without first having paid the license therein required,* shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, etc."

Under this provision, therefore, it will be noted that it is not only necessary to apply for and obtain a license in advance, but also to pay the amount required in advance. If this is not done the person or corporation attempting to do business violates the provisions of the act and becomes subject to the penalties imposed.

In order to follow the suggestion of counsel, therefore, it would not only be necessary to add an additional provision to the act, but also to strike out one or more of the provisions actually contained in the act itself. That all this cannot be done by the application of common sense and reason requires no argument. The reason and common sense should have been applied at the time the act was enacted.

3. *The Act Confers Arbitrary Power upon the Court In Relation To the Matters Indicated In the Opening Brief.*

In reply to the argument advanced in the opening brief upon this proposition counsel says, "To say the least, this is a rather strange objection to come from a defendant that has refused to apply for a license or to pay its taxes when ascertained." This objection may

be strange, but it is equally true that the doctrine that one must comply with a void act before he will be heard to assert its invalidity, has a very unfamiliar ring to it. Counsel's contention is that one is estopped from questioning the validity of a law unless he has first complied with it. It is but necessary to state this proposition in order to refute it.

Nor can very much blame be attached to a mining or fishing concern for not paying the amount of its license taxes at the end of the season when they can be ascertained. In the case of the mines they cannot be ascertained until the close of the year, and in the case of the fisheries they cannot be ascertained until the close of the fishing season. In order to pay the taxes when ascertained, therefore, the mining or fishing concern would be obliged to pay the amount of the license for the first day's violation, double the amount for the second day's violation, three times the amount for the third day's violation, and in addition to this, surrender itself to suffer imprisonment for a period of not less than thirty days nor more than six months, and these cumulative fines and terms of imprisonment would have to be calculated by considering each day in the year a separate offense in the case of the mines, and each day composing the fishing season a separate offense in the case of the fisheries. The fact that the Territory in bringing these actions has confined itself to a demand for the penalty imposed for the first day's violation does not alter the fact that in addition to this penalty the defendant is under the law also liable to all the other

cumulative penalties. Nor would a payment of the amount demanded in these actions wipe out the criminal liability resulting from a violation of the act. Nowhere is it provided that this would be the result, nor is anyone given the power to compromise these crimes.

Counsel says: "No such difficulty or objection has ever arisen under the Act of Congress, and indeed could not arise." This statement of counsel is quite true, and the reason for it is that the act of Congress referred to does not contain the provision to which this objection is made. The first paragraph of the Act of the Territorial Legislature was copied from the Act of Congress relating to license taxes, but the paragraph conferring this arbitrary power upon the Court or Judge was not copied from that act but was copied from the Act of Congress relating to licenses for the sale of intoxicating liquors. The Act of Congress relating to the sale of intoxicating liquors is published as Section 2572 of the Compiled Laws of Alaska and is as follows:

> "That the licenses provided for in this Act shall be issued by the Clerk of the District Court or any sub-division thereof, in compliance with an order of the Court or Judge thereof duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses and of the action of the Court thereon."

Section 2 of the Act of the Territoral Legislature is a copy of the section just quoted and was not copied

from any provision contained in the Act of Congress relating to licenses in connection with trades or business.

In order to refute the statement of counsel that the Court in issuing a license under this provision is performing a mere ministerial act and has no function to perform upon the tendering of the money except to issue the license, it is but necessary to call attention to the language of the provision. Under it the Court or Judge does not issue the license at all. The license is issued by the Clerk. The Clerk is made the ministerial officer by whom the ministerial duties are performed; but he cannot act until the Court or Judge has made an order.

The act provides for action by the Court, but this action is based upon recommendations and remonstrances. Since this matter was fully discussed in our opening brief it will not be further referred to here.

4. *That the Tax Sought to be Collected does not Conform to the Requirements in the Organic Act Relating to Uniformity and Assessment According to Value.*

According to the contention of counsel for the Territory in the discussion of this matter, the fact that the authority of the Legislature is extended to all rightful subjects of legislation gives the Territorial Legislature a right to impose and collect license taxes regardless of the other provisions and limitations contained in the Organic Act itself. If the provision extending the power of the Legislature to all rightful subjects of legislation stood alone, and no limitations were imposed upon the taxing power, it must be conceded that any tax not laid

in violation of the provisions of the Federal Constitution could be imposed and collected. But such is not the case in Alaska. While the authority of the Legislature extends to all rightful subjects of legislation, it is expressly provided that "All taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws and the assessment shall be according to the actual value thereof."

The effect of this provision in the Organic Act and the decisions relating to similar provisions contained in the various state constitutions, have been fully discussed in our opening brief. To the arguments there advanced and the authorities cited and discussed counsel makes no reply. The brief of counsel contains the bald statement "And as a matter of fact the provision quoted from Section 9 of the Organic Act has absolutely no application to license taxes." No reason is assigned for this statement and no authorities cited except a quotation from Cyc., which contains the following:

> "The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that, if those following the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded on a real distinction and not merely

arbitrary or capricious. To this extent also, and no further, the principle applies to license fees or taxes imposed under the police power for the better regulation of occupations supposed to have an important public aspect."

While a general statement from a text book based upon the decisions of the state courts with reference to the meaning of the limitations upon the taxing power found in the state constitutions can have but little value in considering the effect of the limitation upon the taxing power contained in the Alaska Organic Act, because these limitations as found in the state constitutions are in all cases, as has been pointed out in the opening brief, widely different from the limitation found in the Alaska Organic Act, it will be noted that the quotation from Cyc referred to in the brief of counsel for the Territory and above quoted states in express terms that these limitations are applicable to license taxes, and cannot, therefore, be relied upon as any authority for the statement of counsel that they are not so applicable.

Counsel also refers to the case of Binns vs. The United States, but in that case none of the questions here involved were before the Court. The only question there was whether Congress could collect a tax in the Territory that was not uniform throughout the United States, and it was held by the Court that because this was a local tax levied for the purpose of meeting the expense incident to the administration of the law in the Territory it did not come within the inhibition "That all duties, imposts and excises shall be uniform through-

out the United States." None of the questions presented in this case were before the Court in that case. If the decision in that case has any bearing upon the issues in this case whatsoever it is upon the point that these license taxes are taxes within the meaning of that term when used in the Constitution. Say the Court upon that point:

> "We shall assume that the purpose of the license fees required by Section 460 is the collection of revenue and that the license fees are excises within the constitutional sense of the term. Notwithstanding we are of the opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the administration of the local government in Alaska."

5. *Relating to the Argument of Counsel that License Taxes are Expressly Provided for in the Organic Act.*

The Organic Act contains the provision "That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

The language quoted is part of a provision limiting the power of the Legislature in relation to the modification and repeal of certain laws in force at the time the Organic Act was passed. Its effect was fully discussed in our opening brief. It was there pointed out, first, that the provision quoted was not a grant of powers at all, and second, that even if viewed as an express grant of powers, it did not confer the right to impose a license tax, in that the power to license conferred authority only

to exact a license in connection with regulations imposed under the police power, and the authorities bearing upon that question were cited and discussed.

In addition to what was there said, attention is directed to the following provision contained in Section 9 of the Organic Act:

> "No tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per centum of the assessed valuation of property within the town in any one year."

It will be noted that the extent to which the taxing power can be exercised by either the Territorial Legislature or the municipalities is clearly defined and limited by the Organic Act. While these provisions are limited to the taxation of property within the territory in the one case, and the taxation of property within the municipality in the other case, this reference to property was made necessary to indicate that the power of the Legislature to levy taxes extended to all property within the territory, while that of the municipality extended to such property only as was situated within the municipality. The object of the provision is clearly to limit the power of taxation; not the power of levying taxes on property only, but taxes. Its purpose is to prevent over-taxation. Clearly, Congress would not so jealously guard property against over-taxation and leave industry without any protection whatsoever.

If counsel's contention in this regard is correct, Congress expressly protected idle property against overtaxation while it expressly provided that those engaged in producing wealth might be taxed in whatever sum the Legislature might feel inclined to exact. Independent of all other considerations, therefore, this provision in the Organic Act clearly indicates that it was the intention of Congress that the taxing power of the Territorial Legislature should be limited to a tax of one per cent on the assessed valuation of property in the Territory, while that of the municipality should be limited to a tax of two per cent on the assessed valuation of property in the municipality, and that no other or further taxes should be assessed.

But, as has already been indicated in the opening brief, the power to license does not carry with it the power to tax, but merely the power to require a license in connection with the regulations imposed under the police power. A license tax, if it can be required and exacted at all, must be exacted under the taxing power, and this power is by the Organic Act made subject to certain fixed limitations.

In justification of the law enacted by the Territorial Legislature counsel says that the population of Alaska is largely centered in the neighborhood of towns, and that ninety-nine per cent of the taxable property of the territory, excluding fishing and mining, is within the incorporated towns, and that the Legislature, with the express view of exempting property in the incorporated towns from taxation for territorial purposes, laid this

license tax on mining and fishing. The excuse counsel offers for this is that the municipalities were already taxed for municipal purposes, and that it would cost more money to collect a property tax than a license tax.

In discussing the effect of this law in the opening brief it was assumed that the Legislature acted fairly, and that it was not the purpose of the Legislature to collect taxes from the mining and fishing industries alone, but that this result followed accidentally. Now comes counsel and advises the Court that it was the result of premeditation, that the mining and fishing industries were selected to pay the expense of the territorial government in order that other property might not be called upon to bear any part of the burden. The excuse that municipalities were already taxed is a very lame one. Municipalities throughout the United States are taxed for municipal purposes, yet everywhere property within these municipalities bears its just proportion of the expenses incident to the administration of the state governments, and counsel forgets that the mines and fisheries were already taxed before the enactment of this law, under the Act of Congress. He also forgets that the moneys collected under the Act of Congress as license taxes from those residing within the incorporated towns is turned over by the Federal government to the municipalities to be expended for municipal purposes, so that those residing within the municipalities and paying the license taxes receive the benefit of the taxes so paid, while the taxes paid by the mines and the fisheries situate outside of the incor-

porated towns are, in the main at least, turned into the general Alaska fund. Again he forgets that some of the fisheries, at least, are situate within the incorporated towns. Petersburg, Fort Wrangel and Ketchikan have within their boundaries at least one or more salmon canneries, while Juneau and Sitka have within their boundaries cold storage fish plants, and this may be true, so far as is known, of other municipalities.

If the statement of counsel is correct that the mines and fisheries were taxed for the express purpose of relieving property within the towns of taxation, it is reasonable to assume that the exemption of five thousand dollars in the case of mines was made for the express purpose of relieving the placer mines from taxation, throwing the entire burden on the quartz mines and the fisheries. For this is the effect of the act, as was pointed out in the opening brief.

Nor is the point made by counsel, that the expense of levying a property tax would be greater than that of levying a license tax, a valid one. Under the conditions mentioned, that ninety-nine per cent of the property is situated within the incorporated towns, where it has already been assessed, it would not be a difficult matter to assess this property in connection with the levying of a tax for territorial purposes. It might be more expensive the first year than the collection of a license tax, but this additional expense would be slight and would not be any excuse for the imposition of an unjust and unequal tax laid upon the mines and fisheries alone.

The statement of counsel that the salmon industry produced somewhere in the neighborhood of twenty million dollars is more or less misleading. While the selling price of the product might have been this much in a single year, this product is composed not only of the fish, but it contained the tin, lumber, labor, and all kinds of material that composed the finished product, and the fish canned form a comparatively small item in calculating the total cost of the product. According to the statement of counsel it was not the purpose of the Territorial Legislature to tax the fishing industry at all, but the object of the tax was to sell the fish. By what authority the Legislature acted in the selling to the fisheries the fish found in the waters of Alaska is not stated.

That the fisheries and the mines should pay their just proportion of the expense incident to the administration of government in Alaska cannot be denied, but it is unfair and unjust to cast the entire burden upon these industries. An ad valorem property tax would distribute the burden of taxation equally, and would in all respects comply with the requirements of the Organic Act and the Federal Constitution.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,

Attorneys for Plaintiff in Error.

No. 2731.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

PETITION FOR REHEARING.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

THE JAMES H. BARRY CO.

Filed
OCT 4 - 1915
F. D. Monckton,
Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

ALASKA PACIFIC FISHERIES,
a corporation,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

No. 2731

PETITION FOR REHEARING.

Comes now the plaintiff in error and respectfully petitions this Honorable Court for a rehearing herein upon the grounds and for the reasons hereinafter enumerated:

In the case of Alaska Mexican Gold Mining Company against the Territory of Alaska, No. 2727, a petition for rehearing was filed. The matters presented in that case are in many respects similar to those presented in this cause.

The first, second and third reasons assigned and discussed for a rehearing in that cause also present themselves here. We will not, therefore, burden the Court

by again repeating what was there said. The sixth ground urged and discussed in our petition for rehearing in the case of Alaska Mexican Gold Mining Company against the Territory, also presents itself in this cause. This is the most important point that we desire to urge. It deals with the question of whether the tax imposed is valid, notwithstanding the fact that it is not uniform upon the same class of subjects and it is not assessed according to value.

The 9th section of the Organic Act provides:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessment shall be according to actual value thereof."

The Court held that the tax in question being a license tax need not comply with these requirements, and in relation to this matter say:

> "We take it to be undisputable that the creation of revenue by the imposition of license taxes upon carrying on all business is in a general sense a rightful subject of legislation, but in this matter inquiry into the general questions is unnecessary for as already pointed out we have express transfer of authority to the Territorial Legislature to impose license taxes. The power, therefore, being in the Legislature, such taxes may be imposed without the restrictive limitations which must control in levying taxes upon property in its usual sense."

We think the Court received the wrong impression in regard to the intention of Congress as expressed in

the Organic Act in relation to this matter of license taxes. One of the most potent reasons why we are of this opinion is found in one of the provisions of Section 9, to which we did not direct the attention of the Court in any of our briefs in any of these tax cases. Nor was this done upon the hearing. This provision is found in Section 9, the same section that contains the limitations upon the taxing power, and reads as follows:

> "and all laws passed or attempted to be passed by such Legislature in said Territory, inconsistent with the provisions of this section, shall be null and void."

Now the provisions of Section 9, the section in which this provision occurs, include the following limitations upon the taxing power:

> "All taxes shall be uniform upon the same class of subjects, shall be levied and collected under general laws and shall be assessed according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of 1% upon the assessed valuation of property therein in any one year, nor shall any incorporated town or municipality levy any tax for any purpose in excess of 2% of the assessed valuation of property within the town in any one year."

It was pointed out in our brief, and we think upon this question there can be no dispute, that the tax in question was not uniform upon the same class of subjects and was not assessed according to the value

of the thing which formed the subject of taxation, and there is, of course, no way to tell whether the tax levied exceeds 1% upon the value of the property taxed or not, because no assessment of the property was made. In view of the fact that these limitations are contained in Section 9, a section which contains the proviso that legislation that does not conform to the limitations therein contained shall be void, we think this Act of the Legislature should be declared void and we think this should follow irrespective of any provisions contained in any other sections of the Organic Act. The insertion of this provision by Congress in the Act, clearly shows that it was the intention of Congress that the limitations imposed in Section 9 should in no wise be modified or restricted because of provisions contained in any other section of the Organic Act. Section 9, because of this express provision declaring legislation in conflict with the limitations contained in that particular section, void, must be construed by itself. And since the limitations upon the taxing power are such that "all taxes" must conform thereto, and the tax in question being such that no attempt was made to in any sense conform therewith, we think that if for no other reason, because of the express mandate contained in the section to which we have above referred, the tax should be declared void.

In our brief we discussed the various constitutional provisions as well as the decisions thereunder touching

similar limitations upon the taxing powers, but, however necessary this discussion may have been to the proper presentation of the case, the fact remains that this particular case must, after all, stand upon its own bottom. For no other Constitution contains limitations on the taxing power so sweeping and exacting as does the Alaska Organic Act. Nor does any other Constitution contain an express provision to the effect that any legislation that does not comply with these limitations is void.

We are fully in accord with the Court in the expression of the opinion that the levying of a license tax or any kind of a tax is a rightful subject of legislation, and we think that such a tax could be levied by the Territorial Legislature if it conformed to the express limitations upon the taxing power, and our objection to the tax in question is not specifically that it is a license tax, but is that the tax does not conform to the provision requiring all taxes to be uniform upon the same class of subjects and requiring all taxes to be assessed according to the value of the thing taxed.

Section 3 of the Organic Act contains a proviso which reads as follows:

> "provided that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

As we have already pointed out, this provision is found in Section 3, and as Section 9, because of the peculiar mandate contained therein, must be construed

by itself to the extent that provisions elsewhere found in the Organic Act cannot operate to restrict or otherwise affect the application of the limitations contained in Section 9. This provision can have no effect, therefore, upon the validity or invalidity of the tax, whatever its effect might have been if the mandate contained in Section 9 had not been there inserted.

As we stated in our petition in the case of Alaska Mexican against the Territory, however, we are inclined to the opinion that the Court received the wrong impression from the reading of this proviso. The impression the Court received from it was that this proviso expressly recognized the right to impose license taxes. That is to say, that the right to impose licenses was equivalent to the right to impose license taxes.

A license being an exaction under the police power, required for the purpose of regulation only, differs from a license tax which is imposed in the exercise of the taxing power for the purpose of raising revenue and the authorities hold that a grant of power to require licenses does not include the power to lay a license tax.

The authorities upon this question were reviewed by us in the brief and referred to, to some extent at least, in the motion for a rehearing in the case of *Alaska Mexican Gold Mining Company* vs. *Territory*. It is not necessary, therefore, that we should again enter into a detailed discussion of this matter here. In our motion for rehearing in that case also we dis-

cussed at some length the various provisions of the Organic Act with a view of showing that the intention of Congress as gathered from the whole act, was not that the Territorial Legislature should have the power to impose license taxes in such a manner as to in any sense violate the limitations upon the taxing power contained in the Organic Act. Upon this question also we will not again burden the Court with a lengthy discussion, but submit the matter upon the discussion contained in our application for a rehearing in the case of the Alaska Mexican against the Territory.

There is one further proposition that arises in this case that did not arise in the case of the Alaska Mexican against the Territory, and it is this, that the tax imposed, while it is denominated a license tax, is in fact not a license tax at all, but a property tax levied without regard to uniformity and without regard to assessment according to value and without regard to the further question of whether it exceeds 1% of the value of the property taxed.

The amount of the tax does not depend upon anything except the number of cases of salmon and is levied at the rate of so many cents per case, depending upon the character of the salmon packed. It seems to us that this is not a tax upon the business at all, but a tax upon the product of the business. It has been often held that a tax of this character is a property tax, notwithstanding the fact that it is called a license tax and the authorities bearing upon

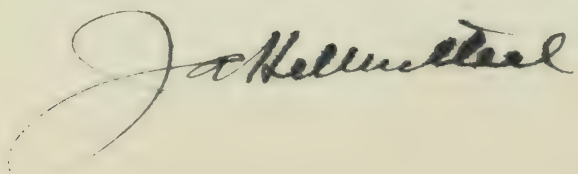
that question have been collected and discussed in our brief.

We direct the special attention of the Court to this point, in view of the fact that it was not specifically passed upon by the Court in rendering the opinion. The point is of especial importance in view of the opinion expressed by the Court that license taxes could be levied in Alaska without complying with the limitations imposed upon the taxing power, for by thus taxing property under the guise of requiring a license tax, these limitations are also avoided in levying property taxes.

Respectfully submitted.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

J. A. HELLENTHAL hereby certifies that he is counsel for the plaintiff in error, the petitioner herein, and that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.



No. 2752

United States

Circuit Court of Appeals

For the Ninth Circuit.

EMERY VALENTINE,

Plaintiff in Error,

vs.

CHARLES A. QUACKENBUSH, Doing Business Under the Firm Name and Style of THE JUNEAU CONSTRUCTION COMPANY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed

APR 2 4 1918

F. D. Monckton,

Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2752

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

In the District Court for the District of Alaska, Division No. One.

No. 1153–A.

EMERY VALENTINE,

Plaintiff in Error,

vs.

CHARLES A. QUACKENBUSH, Doing Business Under the Firm Name and Style of the JUNEAU CONSTRUCTION COMPANY,

Defendant in Error.

J. H. COBB, Juneau, Alaska,
Attorney for Plaintiff in Error.

SHACKLEFORD & BAYLESS and V. A. PAINE,
Juneau, Alaska,
Attorneys for Defendant in Error. [1*]

In the District Court for the Territory of Alaska, Division No. 1, at Juneau.

No. 1153–A.

CHARLES A. QUACKENBUSH, Doing Business Under the Firm Name and Style of the JUNEAU CONSTRUCTION COMPANY,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

*Page-number appearing at foot of page of original certified Record.

Complaint.

Comes now the above-named plaintiff and for a cause of action against the above-named defendant complains and alleges as follows:

I.

That on or about the 1st day of April, 1913, the plaintiff, Charles A. Quackenbush, and one T. A. Bush, and one R. J. F. Mill were engaged together as a copartnership in doing a general contracting and building business under the firm name and style of the Juneau Construction Company and that since said date the plaintiff herein has continued to do business under the firm name and style of the Juneau Construction Company and that the said T. A. Bush and the said R. J. F. Mill have retired therefrom and assigned all of their rights to the plaintiff herein, and that the plaintiff has continued to do business under the firm name and style of the Juneau Construction Company and is the owner of all the assets, bills receivable and accounts of said Juneau Construction Company.

II.

That between the 1st day of April, 1913, and the 1st day of April, 1914, the said Juneau Construction Company, at the special instance and request of the defendant, furnished to the defendant all of the lumber, materials, supplies and labor used [1½] in the erection and remodeling of three certain buildings belonging to the defendant in the town of Juneau, Alaska, and that the cost of said lumber, materials, supplies and labor was $27,931.59, and that the defendant herein agreed to pay to the said Juneau

Construction Company the cost of said lumber, materials, supplies and labor used in the erection, construction and remodeling of said buildings and further agreed to pay to the Juneau Construction Company in addition thereto ten per cent (10%) of the cost of said lumber, materials, supplies and labor used in the erection, construction and remodeling of said building in compensation for the services of the said Juneau Construction Company in superintending the erection, construction and remodeling of the said buildings, and that the said Juneau Construction Company did superintend the construction, erecting and remodeling of said buildings, and that there was due to the said Juneau Construction Company on account of the said lumber, material, supplies and labor used in the erection, construction and remodeling of said buildings and on account of superintending the construction, erection and remodeling of said buildings 31,953.29.

III.

That no part of the said sum of 31,953.29 has been paid except the sum of 26,774.32 and that there is now due and owing of and from the defendant to the plaintiff the sum of 5,020.92 with interest thereon at the rate of eight per cent (8%) per annum from April 1, 1914; that plaintiff has heretofore delivered to the defendant a detailed statement of his account against the above-named defendants and has also delivered to the defendant all vouchers connected with all of the items of said account and has demanded of and from the said defendant the said sum of money but the defendant has failed, neglected and refused to pay

the same or any part thereof. [2]

WHEREFORE plaintiff prays judgment against the defendant for the sum of 5,020.92 with interest thereon at the rate of eight per cent (8%) per annum from April 1, 1914, together with his costs and disbursements herein laid out and expended.

SHACKLEFORD & BAYLESS,
V. A. PAINE,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Charles A. Quackenbush, being first duly sworn, on oath deposes and says: I am the above-named plaintiff and have read the foregoing complaint, know the contents thereof and believe the same to be true.

CHAS. QUACKENBUSH.

Subscribed and sworn to before me this 29th day of August, 1914.

[Notarial Seal] W. S. BAYLESS,
Notary Public for Alaska.

My commission expires Dec. 22, 1917.

Filed in the District Court, District of Alaska, First Division. Aug. 31, 1914. J. W. Bell, Clerk. By J. J. Clarke, Deputy.

[Endorsed]: Original No. 1153–A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Charles A. Quackenbush, Doing Business Under the Firm Name and Style of Juneau Construction Company, Plaintiff, vs. Emery Valentine, Defendant. Complaint. Shackleford & Bayless, V. A. Paine, Attorneys for Plaintiff. Office, Juneau, Alaska. [3]

In the District Court for Alaska, Division No. 1, at Juneau.

No. 1153–A.

CHAS. A. QUACKENBUSH, Doing Business Under the Firm Name and Style of the JUNEAU CONSTRUCTION CO.,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Answer.

The above-named defendant, for answer to the complaint of the plaintiff, alleges:

I.

Referring to the 1st paragraph of said complaint, defendant denies that plaintiff has been doing business as the Juneau Construction Co., ever since April 1st, 1913, or for any longer period than about September 1st, 1913.

II.

Referring to the 2d and 3d paragraphs of said complaint defendant denies all and singular the allegations therein contained, except as hereinafter expressly admitted and alleged.

And for an affirmative defense and cross-complaint against the plaintiff's cause of action, defendant alleges:

I.

That in the month of April, 1913, the plaintiff and T. A. Bush, and R. J. F. Mill were copartners, en-

gaged in the business of superintending the construction of building in Juneau, Alaska.

II.

That on or about the 1st day of April, 1913, the defendant entered into a contract with the said plaintiff, Bush and Mill, under their partnership name of the Juneau Construction Company wherein and whereby the said Construction Co. undertook and agreed to superintend the erection of two certain buildings for defendant [4] in said town, according to plans then and there furnished said company by defendant, which buildings are the same as those mentioned in the complaint herein; that by the terms of said contract said company undertook to employ all needed labor at not to exceed the regular going wages in Juneau, and to purchase all needed material at the market price less the dealer's discount, which said company represented that it could and would obtain by virtue of the business in which it was engaged, and that said discount would more than equal the compensation stipulated for said company as hereinafter stated; that defendant should furnish the said company from time to time as needed and as the work progressed, the funds necessary to pay for said labor and material, and the said company agreed to keep an accurate account of all such moneys, and of all expenditures made therefrom and furnish the same to defendant accompanied by original vouchers therefor; and it was further stipulated that said company should have and receive upon the completion of said work, a sum equal to ten per cent of the total cost of the labor and material employed, bought and

paid for through it. That on or about November 1st, 1913, by a contract by and between plaintiff and defendant, plaintiff undertook the repairing and remodeling of a certain other building for defendant on the same terms and conditions as set forth in the first contract.

III.

That after the said company had entered upon the performance of its said contract the said Bush and Mill retired from said firm (the precise date of which is unknown to defendant), and by some arrangement between themselves (the precise nature of which is unknown to defendant) plaintiff assumed all the duties and liabilities of said firm but the defendant never at any time released said partnership or any member thereof from any obligation to him under said contract.

That between the 10th day of May, 1913, and the 15th day of January, 1914, both inclusive the defendant furnished the said company and plaintiff not only with the sum of $25,932.37 shown and [5] admitted in the bill of particulars filed herein, but in addition thereto with the further sum of $2,500.00 with which last-mentioned sum plaintiff has failed to credit defendant, and making a total of $28,432.37 furnished and paid said company under said contract.

V.

That upon the completion of the said work under said contract plaintiff demanded of the defendant the payment of a further sum of *upwaeis* of $6,000 for a balance alleged by plaintiff to be due him; that defendant was ready and willing to pay any balance

actually due, and has at all times been so ready and willing, but he requested plaintiff give him a full account with original vouchers of the moneys he had received from defendant so that a correct balance could be struck, but the plaintiff failed and refused so to do, but did furnish defendant with copies, or purported copies of various bills and pay-rolls but incapable of verification, but which showed a purported balance due the plaintiff of upwards of $6,000: which sum defendant declined to pay, on the ground that the same was incorrect, contained many items wrongfully charged to the defendant, and was not accompanied by vouchers. The bill of particulars filed herein is a substantial copy of said pretended account, except that by the addition and subtraction of various items and changes in the amounts of others the purported or claimed balance has been reduced.

VI.

Referring to the bill of particulars filed herein defendant alleges that he is not liable for the items $539.40 "plan for block" or for any sum whatsoever therefor, for that the defendant did not furnish any such plan, and is not entitled to any charge therefor.

VII.

Referring to said bill of particulars, *fendant* alleges that he is not liable for the item of $561.72 for "10 per cent on sundry accounts," or for any sum whatsoever on said item; for that, the said sundry accounts therein referred to embrace the heating plant, installation of a lighting and telephone system, plumbing, and painting, [6] none of which was paid for by or through said construction company

or plaintiff, or done under its or his superintendence, or embraced in the said contract.

VIII.

Defendant further alleges upon information and belief, that the prices shown on the several accounts annexed to and contained in said bill of particulars, and the wages shown on the pay-rolls, are not the actual prices and wages paid by the plaintiff or said construction company, but in each instance represents a larger amount than was actually paid; but if the plaintiff or said construction company did pay the prices and wages therein shown, then defendant alleges that the amounts so paid were largely in excess of the amount for which said material could have been purchased, and said labor employed, and that plaintiff and the construction company wrongfully and intentionally increased the cost of said work for the purpose of increasing the compensation they were to receive.

Defendant further alleges that the material shown and charged to him in said bill of particulars is largely in excess of the material actually purchased and used by the said construction company and plaintiff in the prosecution of said work.

IX.

That defendant has no means of ascertaining and stating the true and correct account between the construction company and himself under said contract, for the reason that all the material was purchased, and all the labor employed through said construction company and plaintiff, but he believes and therefore alleges that upon a true and correct statement of such

account, including the compensation stipulated for the said construction company, a balance will be found in defendant's favor for a large sum.

Wherefore defendant prays that, 1st, a true account of the matters and things involved in said contract be taken and stated; 2d. That in taking said account defendant be credited with the sum of $28,432.37, the actual sum furnished by him; 3d. That if upon a [7] balance being struck he is due and owing anything to the plaintiff he is ready to pay the same, so soon as it is ascertained; 4th. That if there is a balance due the defendant upon such balance being struck, that he have judgment therefor against the plaintiff; and 5th. For all costs and disbursements herein incurred; and for such further and other relief, both general and special, as the nature of the case may require, including the appointment of some suitable person skilled in accounting, to take and state the accounts between the plaintiff and defendant and strike a balance and report the same to the Court.

J. H. COBB,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

Emery Valentine, being first duly sworn, on oath deposes and says: I am the defendant above named. I have heard read the above and foregoing answer, and the same is true as I verily believe.

EMERY VALENTINE.

Subscribed and sworn to before me this Nov. 2d, 1914.

[Notarial Seal] J. H. COBB,
Notary Public in and for Alaska.

My commission expires Nov. 9th, 1914.

Service of the above and foregoing answer admitted this October ——, 1914.

_____,
Of Counsel for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Nov. 2, 1914. J. W. Bell, Clerk. By J. J. Clarke, Deputy. [8]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1153–A.

CHARLES A. QUACKENBUSH, Doing Business Under the Firm Name and Style of the JUNEAU CONSTRUCTION COMPANY,
Plaintiff,

vs.

EMERY VALENTINE,
Defendant.

Reply.

Comes now the above-named plaintiff and replying to the Affirmative Defense and Cross-complaint set out in the answer of the defendant herein, admits, denies and alleges as follows:

I.

Referring to paragraph I of said Affirmative Defense and CrossComplaint the plaintiff admits the

allegations therein contained.

II.

Referring to paragraph II of said Affirmative Defense and Cross-Complaint, the plaintiff admits that on or about the 1st of April, 1913, the defendant entered into a contract with the plaintiff, Bush and Mill under their partnership name of the Juneau Construction Company, wherein and whereby the said Construction Company undertook and agreed to superintend the erection of two certain buildings for the defendant in said town; denies "according to the plans then and there furnished said company by defendant"; admits that by the terms of said contract the Juneau Construction Company undertook to [9] employ all needed labor at not to exceed the regular going wages in Juneau and to purchase all needed material at the market price less the dealer's discount which said company represented that it could and would obtain by virtue of the business in which it was engaged; denies that the plaintiff agreed that said discount would more than equal the compensation stipulated for the plaintiff as hereinafter stated; admits that it was agreed that the defendant should furnish the plaintiff from time to time as needed, and as the work progressed, funds necessary to pay for said labor and material and that said company agreed to keep an accurate account of all such moneys and all expenditures made therefrom and furnish the same to defendant accompanied by original vouchers therefor; admits that it was further stipulated that said company should have and receive upon the completion of said work a sum of money equal

to ten per cent of the total cost of the labor and material employed, bought, used and paid for by or through it or the defendant, and admits all the other allegations in said paragraph contained.

III.

Referring to paragraph III of said Affirmative Defense and Cross-Complaint, plaintiff admits that after the said company, the Juneau Construction Company, had entered upon the performance of its said contract that the said Bush and Mill retired from the firm and that the plaintiff assumed all of the duties and liabilities of the said firm; denies each and every other allegation therein contained and alleges the facts to be that the assumption by the plaintiff as the successor in interest of the said partnership of the obligations of the said contract with [10] the defendant was done with the full knowledge and consent of the defendant.

IV.

Referring to paragraphs IV, VI, VIII and IX of the said Affirmative Defense and Cross-complaint, the plaintiff denies each and every other allegation of fact therein contained.

V.

Referring to paragraph V of said Affirmative Defense and Cross-complaint, the plaintiff admits that upon the completion of the said work under the said contract, he demanded of the defendant the payment of a further sum of upwards of $6,000 as and for a balance due him; admits that the defendant requested plaintiff to furnish him a full account, with the original vouchers, of the moneys he had received

from the defendant; admits that the same showed a balance due the plaintiff from the defendant of upwards of $6,000 and denies each and every other allegation of fact therein contained.

VI.

Referring to paragraph VII of said Affirmative Defense and Cross-complaint, the plaintiff admits that none of the sundry accounts therein referred to were paid for or through the Juneau Construction Company or the plaintiff, but denies each and every other allegation of fact therein contained.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of $6,051.55, with interest thereon at the rate of eight per cent per annum from April 1st, 1914, together with his costs and disbursements herein laid out and expended.

SHACKLEFORD & BAYLESS,
V. A. PAINE,
Attorneys for Plaintiff. [11]

United States of America,
District of Alaska,—ss.

I, Charles Quackenbush, being first duly sworn, on oath say: That I am the plaintiff in the above-entitled action; that I have read the foregoing Reply and know the contents thereof and believe the same to be true.

CHARLES A. QUACKENBUSH.

Subscribed and sworn to before me this 16th day of November, A. D. 1914.

[Notarial Seal] W. S. BAYLESS,
Notary Public for Alaska.

My commission expires Dec. 22, 1917.

Due service of a copy of the within is admitted this —— day of ———, 191—.

———————————,
Attorney for ————.

Filed in the District Court, District of Alaska, First Division. Nov. 16, 1914. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: Original No. 1153—A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Charles A. Quackenbush, etc., Plaintiff, vs. Emery Valentine, Defendant. Reply. Shackleford & Bayless, Attorneys for Plaintiff. Office, Juneau, Alaska. [12]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1153—A.

CHARLES A. QUACKENBUSH, Doing Business Under the Firm Name and Style of the JUNEAU CONSTRUCTION COMPANY,
Plaintiff,

vs.

EMERY VALENTINE,
Defendant.

Judgment.

This matter coming on for hearing before the above-entitled court, and a jury on the 24th day of February, 1915, the plaintiff being represented by his attorneys, Messrs. Shackleford & Bayless and V. A. Paine, and the defendant by his attorney, J. H.

Cobb, Esq., and both sides having submitted oral and documentary evidence and rested, and after the arguments of the respective counsel and instructions of the Court, and the jury having on the 2d day of March, 1915, filed their verdict herein, which is in words and figures as follows, to wit:

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1148—A.

CHARLES A. QUACKENBUSH, Doing Business Under the Firm Name and Style of the JUNEAU CONSTRUCTION COMPANY,
Plaintiff,

vs.

EMERY VALENTINE,
Defendant.

Verdict.

We, the jury, duly empanelled and sworn in the above-entitled action, find for the plaintiff herein, in the sum of $3,706.07, with interest from the 1st day of May, 1914, and [13] find that the plaintiff is entitled to recover of said defendant the said sum with interest.

(Signed) J. N. STEPHENSON,
Foreman.

And the defendant having filed on March 5th, a motion for a new trial, and the Court having denied the same;

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of and

from the defendant, the sum of $3,706.07, with interest thereon at the rate of 8% per annum from the 1st day of May, 1914, to date, amounting to $3,982,77/100, with interest thereon at the rate of 8% per annum until paid, together with its costs and disbursements to be taxed by the clerk of the court.

Done in open court, this 6th day of April, 1915.

ROBERT W. JENNINGS,
Judge.

Entered Court Journal, No. K, page 286.

O. K. as to form except that defendant desires to be heard on question of costs.

COBB.

Filed in the District Court, District of Alaska, First Division. Apr. 6, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [14]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1153—A.

CHARLES A. QUACKENBUSH, Doing Business as the JUNEAU CONSTRUCTION CO.,
Plaintiff,

vs.

EMERY VALENTINE,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the trial of the above-entitled and numbered cause, the following proceedings were held, to wit:

[Testimony of Charles A. Quackenbush, in His Own Behalf.]

CHARLES A. QUACKENBUSH, being first duly sworn and having testified that the Juneau Construction Co. was originally composed of himself, a Mr. Mill and a Mr. Bush, and that said Mill and Bush withdrew from the firm about July, 1913, further testified as follows:

Q. Now, turning to page one of the bill of particulars Emery Valentine to Juneau Construction Company, with the total at the bottom—just state, in a general way, to the jury what that first page represents.

A. Well, the first page here is the material, transfer bills, pay rolls, freight bills, and so forth—in fact, a complete statement of the cost of the building.

Q. That is a summary of the itemized bills that follow? A. Yes, exactly.

The COURT.—Do I understand the witness is holding a copy [15*—1†] of your bill of particulars?

Mr. SHACKLEFORD.—Yes, sir.

Q. Now, on page 2, at the top of the page there are five accounts, marked "American Paint Company, Alaska Electric Light and Power Company, Juneau Iron Works, Marshall and Newman and Telephone Company"—what do those accounts represent?

A. The American Paint Company, $800; the Alaska Electric Light and Power Company, $550.50

*Page-number appearing at foot of page of original certified Record.
†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of Charles A. Quackenbush.)

—that was done on straight day work, the same as the balance of the work; the Juneau Iron Works, $2,972.50, was a contract for the heating which was let through the office of the Juneau Construction Company; the Juneau Construction Company furnished detail drawings and specifications, and figured out the radiation for each room, and everything; the bids were received and let through the office of the Juneau Construction Company.

Q. The bill of Marshall and Newman—what was that for?

A. That was for the plumbing; that was let the same way.

Q. The Telephone Company?

A. The Telephone Company was for wiring—roughing in for the telephone system.

Q. Those five bills on page 2 were not paid by the Juneau Construction Company?

A. No; they were not, for this reason: When Mr. Forrest's first payment was due for the plumbing, Mr. Valentine spoke about it and said he guessed Forrest was entitled to the payment—I don't remember the exact amount, though it was a thousand or fifteen hundred dollars—and he asked me if it was the same to me if he paid the bill, as it would be the same as if I paid it, and I said, "All right," and he said, "Very well, I will [16—2] give Forrest a check and get a receipt so you can get your percentage," which he did—I think it was $1,500.

Q. Now, Mr. Quackenbush, all you are suing for on these five items is the ten per cent commission?

(Testimony of Charles A. Quackenbush.)

A. Just the commission to which we are entitled.

Q. When the Forrest bill was paid by Mr. Valentine, did he bring the receipts around and leave them with you? A. He gave me two.

Q. Are those the two which he gave you? (Handing papers to witness.)

A. Yes, sir.

Mr. SHACKLEFORD.—We will offer the two in evidence as Plaintiff's Exhibits Nos. 1 and 2.

Mr. COBB.—No objection.

The COURT.—Now, those are the receipts the Juneau Iron Works gave Mr. Valentine, and Mr. Valentine turned over to the Juneau Construction Company?

Mr. SHACKLEFORD.—Yes.

The COURT.—Very well.

(Whereupon said receipts were received in evidence and marked Plaintiff's Exhibits Nos. 1 and 2.)

Q. Now, the remainder of page 2, Mr. Quackenbush, what does that show?

A. That shows the cash credits of Mr. Valentine.

Q. Have you received anything other than the amounts set forth on page 2 from Mr. Valentine on this account? A. No, sir.

Q. Now, turn over to the next page—what does that represent? Is that a detailed statement of the account shown on page 1?

Mr. COBB.—I object—let the witness testify, don't let counsel state. **[17—3]**

Mr. SHACKLEFORD.—If counsel insists, I will

(Testimony of Charles A. Quackenbush.)

ask the witness that this represents—it is very evident.

A. It is a detailed statement—starts with material on the 23d of April—

Q. From whom?

A. Starts out with the Alaska Supply Company; in making up this, we have bunched the different supply houses to show all the goods from each house under one bill.

Q. Have you gone over this statement of the Alaska Supply Company? A. I have.

Q. Are all these items taken from bills delivered by you to Mr. Valentine, or not?

A. Every one of them.

Q. And have you traced the requisition numbers and the items therein, so as to find out whether that material actually went into the construction of the building? A. Yes, sir.

Q. Now, what have you to say as to that?

A. Why, this material was all on our requisition; when we first started the Construction Company it was quite a problem to get a book system; this material, as you will notice by the bill of particulars was all on our requisition numbers. For instance, if you wanted a thousand feet of lumber we made out a requisition for one thousand feet of lumber to the company, and then it had to be signed and marked with the job it went to; and then when this material was billed out at the end of the month, why, everything had to have the requisition number, and we paid no bills unless they had a requisition for it.

(Testimony of Charles A. Quackenbush.)

Q. So that by following the requisitions you could tell just where that particular item went to? **[18—4]**

A. We could check it back from the bill they rendered and see where it went to that way.

Q. On every bill the requisition number would appear? A. Yes, sir.

Q. Now, turning over to page 7 of the account, what is that? A. C. W. Young Company.

Q. Is this made up in the same manner as the Alaska Supply Company bill?

A. Exactly the same.

Q. Have you made an investigation as to whether or not the items appearing on that bill went into the construction of the building that you were working on for Mr. Valentine?

A. Everything was carefully checked out; Mr. Valentine got a statement the first of every month after July.

Q. July of what year?

A. 1913; there was a couple of months the statements were not gotten out the first of the month; Mr. Valentine didn't care about it, and when I insisted upon his checking it he always put me off, didn't have time, never could get him into the office to look at the bills; he had a statement every month of these statements, and I spent lots of time before they left the office—we always kept a bookkeeper and I went over every statement every month before it left the office.

Q. Now, just state to the Court and jury whether

(Testimony of Charles A. Quackenbush.)

this material that went into the construction was purchased by the Juneau Construction Company direct for the concern, or whether it was purchased by Mr. Valentine?

A. Whether it was purchased for us, this material?

Q. I mean whether it was purchased on Mr. Valentine's **[19—5]** credit or the credit of the Juneau Construction Company?

A. Every dollar's worth that went in here was charged to the Juneau Construction Company and bought on the Juneau Construction Company's credit—both out of town and in town.

Q. With reference to the items of the C. W. Young & Company's bill on pages 7, 8 and 9, above the total marked $1,243.72, what have you to say as to where those supplies went?

A. Well, now, take the Young Company's bill here, it starts out April 26th—

Q. I mean with reference to the three buildings that you were working on?

A. Yes, it went on the two buildings. For instance, April 26th, there, the first item there would go into the building known as the Arctic pool hall on Front Street.

Q. Just tell the jury what three buildings you were engaged in?

Mr. COBB.—I object to that; they first start in with two buildings and now they bring in the third.

Mr. SHACKLEFORD.—One was a repair job.

The COURT.—Objection is overruled.

Mr. COBB.—To which we except.

(Testimony of Charles A. Quackenbush.)

Q. Now, just explain to the jury what the three buildings were, and the order in which the work came up?

A. The first building was the building in which the Arctic Pool Parlor is now, on Front Street; that started in April.

Q. April, 1913?

A. April, 1913. The second one was the Valentine Block, **[20—6]** on the corner of Front and Seward, the Valentine Block there; that was a new block, and also included lowering the old block that was there; we lowered that something like a foot and put a new foundation under it; and the third one was the old jewelry store where Mr. Valentine was before he moved into the new place; we remodeled it and fixed it up for a pool hall.

Q. I understand the first building was what?

A. The first building was the building where the Arctic pool hall is on Front Street.

Q. Is that next to the Valentine Jewelry store?

A. No, Front and Franklin Streets, where they intersect there.

Q. The second building was the Valentine Building?

A. Yes; and the third one was the old jewelry store that Mr. Valentine moved out of.

Q. In addition to erecting the Valentine building, did the Juneau Construction Company have anything to do with wrecking the previous buildings on that lot?

A. Yes; the first buildings there—it was all cov-

(Testimony of Charles A. Quackenbush.)

ered with shacks; we tore down the old shacks there, and turned that building over to the tenant in something like 35 days, I think, two stories and plastered.

Q. You proceeded and built that building. What, if anything did you have to do with reference to rapid work on Front street there?

A. Well, that was a case of, I guess, stealing a little ground from the city, or something like that—a few feet of ground in front there; we started the job Saturday evening—

Mr. COBB.—I object to that as incompetent, irrelevant and immaterial. [21—7]

Mr. SHACKLEFORD.—I want to show the nature of the work and the speed he had to use with it.

The COURT.—Speed doesn't make any difference; he doesn't get anything extra for speed.

The WITNESS.—Your Honor, the cost would be more.

The COURT.—Whatever the cost was, if your contract calls for it, you are entitled to it.

Q. Mr. Quackenbush, what is this—I will show you this bundle of plats?

A. Why that is the drawing that we made for the Valentine block.

Q. Something was said in the opening statement about Mr. Valentine having furnished you with those plans; just state what the facts are in regard to that.

A. These plans were made under Mr. Valentine's orders and direction; Mr. Valentine did have an old sketch that he brought over there but it wasn't any-

(Testimony of Charles A. Quackenbush.)

thing that he wanted—he gave us the job—this was the first estimate we made, was for the plans before he gave us the work on the building.

Mr. COBB.—I shall object to testimony on that line, your Honor. In accordance with the opening statement of counsel they were, in addition to the ten per cent, to have 2½ per cent for the plans; it isn't within the issues of the case.

Q. Mr. Quackenbush, what if anything, was done by the Juneau Construction Company with reference to making the plans for the building?

A. Well, we have here the plans of the Valentine block; this is the cloth tracing of the blue-prints which were made for the building.

Q. Who was that made by? [22—8]

A. This was made by the Juneau Construction Company; we employed an architect from Seattle.

Q. At Mr. Valentine's request?

A. Yes, sir; of course, we had the architect working on this for a great many days, as the work will show for itself to anyone familiar with it.

Q. Did you have any conversation with Mr. Valentine as to how this work was to be paid for?

A. It was distinctly agreed upon that 2½ per cent was to be the cost of the plans, which is very reasonable for architectural work.

Mr. COBB.—Repeat that, I didn't get it.

A. It was agreed that 2½ per cent was to be paid for the plans.

Mr. COBB.—I object to that and ask that it be stricken.

(Testimony of Charles A. Quackenbush.)

Q. Those are the plans in accordance with which the building was constructed? A. Yes, sir.

Q. Any other plans that were used in the construction of the building? A. No, sir.

Mr. COBB.—All the testimony in regard to the plans and the agreement to pay 2½ per cent of the cost *us* moved to be stricken.

The COURT.—Motion will be denied.

Mr. COBB.—To which we except.

Q. Now, turning back to page one, at the bottom of the page there, Mr. Quackenbush; there is an item "Plans for block, $666.82"; is that an item made out upon a 2½ per cent calculation on the total cost of the block? A. What page?

Q. Page 1, after the total debits and the total credits, [23—9] $666.82—is that 2½ per cent of the total cost of that particular block? A. Yes, sir.

Q. Now, what was the total amount of the bills for labor and materials which were actually purchased by the Juneau Construction Company for this work, outside of your commission and plans for the block—indebtedness incurred by you?

A. $27,931.59; that is material and pay-rolls.

Mr. COBB.—As I understand, that represents labor and materials?

A. Yes, sir.

Q. Now, in addition to that, turn to page 2, the five items of bills paid by Mr. Valentine direct?

A. Yes, sir; Mr. Valentine paid those direct.

Q. $5,617.20? A. Yes, sir.

Q. And you make no claim except the commission on them?

(Testimony of Charles A. Quackenbush.)

A. Just the commission, which is customary in every place in the United States where I ever done business.

Q. It is understood those five items at the top of page 2, American Paint Company, Alaska Electric Light and Power Company, Juneau Iron Works, Marshall and Newman and the Telephone Company, are what are called sundry accounts, upon which a ten per cent commission is charged on page 1; so that in addition to the actual indebtedness incurred by the Juneau Construction Company for labor and materials you have charged the further sum of 10 per cent of the cost of the building, amounting to $2,793.16?

A. Yes, sir.

Q. For commission on the sum above mentioned—

A. Yes, sir. [24—10]

Q. And 10 per cent on the Sundry Accounts paid by Mr. Valentine? A. Yes, sir.

Q. And $666.82 for the plans of the blocks?

A. Yes, sir.

Cross-examination.

(By Mr. COBB.)

Q. Mr. Quackenbush, the Juneau Construction Company you say, first consisted of Mr. Mill, Mr. Bush and yourself? A. Yes, sir.

Q. Sometime in July, 1913, did you have any conversation at all with Mr. Valentine personally regarding this contract, at the time it was made?

A. At the time it was made?

Q. Yes.

A. Not right at the time; later on, though, at different times.

(Testimony of Charles A. Quackenbush.)

Q. Now, as a matter of fact all the conversation Mr. Valentine had with the Juneau Construction Company was with Mr. Mill, was it not?

A. The first agreement, but I talked it over with Mr. Valentine a month later—two weeks later, and after that several times.

Q. You talked it over with him? A. Yes, sir.

Q. The agreement, however, was made by Mr. Mill? A. Yes, sir.

Q. Did Mr. Valentine ever state to you the terms of the agreement he made with Mr. Mill?

A. Yes, sir.

Q. When was that? **[25—11]**

A. At different times we have talked about it; I don't remember the exact dates.

Q. Can't you approximate it? Let us try to get it a little more definite.

A. Pretty hard to fix dates; I expect maybe a month after Mr. Mills first made the agreement with him.

Q. Well, about what was the date of the agreement, do you know? A. It was about April.

Q. What time in April?

A. I couldn't tell you exactly, Mr. Cobb, without looking at the records.

Q. You claim then that you had a conversation with Mr. Valentine some time in May?

The COURT.—April of what year, Mr. Quackenbush? A. 1913.

Q. You claim then that you had a conversation with Mr. Valentine some time in May, 1913, in which

(Testimony of Charles A. Quackenbush.)

he stated to you the terms of the contract he had made with the Juneau Construction Company—with Mr. Mill? A. Yes, sir.

Q. Where was that conversation?

A. In the jewelry store—the old jewelry store.

Q. Who was present?

A. No one only Mr. Valentine.

Q. What was the occasion of his telling you what the contract was?

A. Well, he was just talking over business matters, telling me how well pleased he was so far; we talked it over at that time, when the whole thing come out.

Q. Now, I just want you to tell the jury what he told you at that time was the contract he had made with Mr. Mill.

A. Well, in regard to the balance, he said that he was [26—12] satisfied about the 2½ per cent for plans if he had a good plan—he wanted a good plan; he had been buncoed on two sets of plans, and he hoped he would get a good set this time; that was about the words that he used in regard to the plans.

Q. You are positive he told you that?

A. Yes, sir.

Q. Did he say anything else about any other terms of the contract?

A. Well, it was talked over about the work; I don't remember the exact words; we wasn't making any terms nor nothing—just talking over different matters.

Q. That is the best you can answer?

A. Why, I can't think of the exact words that Mr.

(Testimony of Charles A. Quackenbush.)

Valentine used—not the exact words.

Q. Did he ever tell you that he was going to pay ten per cent on the total cost of the building?

A. Certainly did.

Q. When?

A. Why, at different times; I don't know as he ever said so; it was talked over as a matter of fact, and I know that had been understood.

Q. Now, Mr. Quackenbush, if you are telling the jury the facts about that, when you drew your complaint herein why didn't you sue for 12½ per cent of the total cost of the building, under your alleged contract?

A. Because I was entitled to ten per cent of the total cost of the building.

Q. And 2½ per cent, you say, for the plans?

A. Yes, sir.

Q. That makes 12½ per cent, doesn't it?

A. Yes, sir.

Q. Why didn't you sue for that? **[27—13]**

A. Well, it makes a little different balance, I think. That ten per cent, that is for superintendence, and I am entitled to ten per cent for superintendence on every bit of work that I done and material furnished; and the 2½ per cent is much less than my other commission.

Q. You are charging 2½ per cent in addition, then, to the ten per cent you are charging on the work done and material furnished?

A. I am asking for 2½ per cent of the total cost of the Valentine building, not the old building.

(Testimony of Charles A. Quackenbush.)

Q. Answer the question—you are also charging 2½ per cent in addition then to the 10 per cent?

A. Certainly—regular architect's fees.

Q. So in addition to the ten per cent of the total cost of the building so far as labor and material is concerned, you are charging Mr. Valentine 2½ per cent on your commission of ten per cent and adding it to the other, is that right?

A. That is for separate services altogether.

Q. Answer the question—is that what you are doing?

A. I charged Mr. Valentine, as I stated before, 2½ per cent for the plans of the Valentine block, and I am asking 10 per cent commission on the total work done.

Q. Does that ten per cent—the amount you calculate your 10 per cent on, include the cost of the plans?

A. It does not.

Q. Does the 2½ per cent you calculate for architect's plans, include your commission on the building?

A. Does it include—

Q. It is calculated on your 10 per cent commission as well as the other cost?

A. Certainly not. **[28—14]**

Q. What is it calculated upon?

A. It is calculated on the net cost of the building, which is customary in architect's fees.

Q. Customary?

A. The world over, any place I have been.

Q. What do you tell the jury is the net cost, as you call it, of the Valentine Block?

(Testimony of Charles A. Quackenbush.)

A. The total cost of the block is $26,673.30.

Q. $26,673.30? A. Yes, sir.

Q. That, you tell the jury, is the cost of the Valentine Building upon which you charge this 2½ per cent commission? A. Yes, sir.

Q. Now, in going through this account that you swore to here, did you attend to the addition of the figures? A. You mean the clerical work?

Q. Additions and totals.

A. Not altogether—I merely checked it over, and the material bills.

The COURT.—Are you now speaking of the bill of particulars attached to the complaint?

Mr. COBB.—Yes, a copy of which he has been testifying to.

Q. Did you go through and verify the totals that were carried down? A. I didn't add them up.

Q. You don't know whether there is any error in those totals or not?

A. There might be a little discrepancy—clerical error, there.

Q. And the totals you testified to as being correct, you don't know whether there are any errors in the totals, or not? [29—15]

A. They are correct as far as I know, subject to little clerical errors,—there is a mass of work there.

Q. Do you know of any?

A. No, only what have been corrected.

Q. You know of none except that have been corrected. Now, there is one matter I want to explain to the jury and see what your ideas are about it. In

(Testimony of Charles A. Quackenbush.)

the statement which you say you first gave to Mr. Valentine you put in your plans at $541, where did you get that amount from?

A. Well, we had a little different total there from what we had here; there has been a couple of errors found and corrections made; it was figured always from the total cost of the building—the net cost of the building.

Q. Well, the difference between $541 and $666 is something over $125, isn't it? A. I think so.

Q. Now, from where did you get the increased cost of the building to make this 2½ per cent of the increased cost reach $125 last April?

A. I have got the figures here where I got it from.

Q. Where did you get the increased cost from?

A. Well, you see there was corrections—Mr. Valentine never claimed any errors until he come to court.

Q. I wish you would answer the question and not keep telling me about what Mr. Valentine has been doing or saying. Where did you get that increased cost from to make your 2½ per cent on it run up to $125.? A. On corrections of the statements.

Q. $125 is 2½ per cent of $5,000, isn't it—can you answer that question?

A. No, I cannot tell you examtly, Mr. Cobb. [30—16]

Q. Well, we will assume that $125 is 2½ per cent of $5,000—I think the jury can all tell in a minute that is correct. Where did the increase of $5,000 in this building come from from the time you first pre-

(Testimony of Charles A. Quackenbush.)

sented your bill to Mr. Valentine to the time you are now talking about?

A. In the first place, these sundry accounts wasn't added in.

Q. Then as a matter of fact there was no increase cost in the building discovered, was there?

A. No; I think there was a correction made in the plans so the cost decreased a little bit.

Q. Then why did you increase your 2½ per cent by $125?

A. Well, it was simply an error in the office.

Q. It was what? A. It was a mistake.

Q. And on your second account that you presented when you claimed a balance of $6,051, you put in your plans then at $539.40, didn't you? A. I think so.

Q. That is after you had time to go over it again and you reduced it a little—what did you figure it on that time?

A. Mr. Cobb, this bill of particulars is too lengthy, and there has been so much time spent on it; I couldn't tell every little thing like that—the errors and things that have been found; if I had the bills and vouchers I suppose then I might tell something about it.

Q. You can tell the jury if you know what you figured it on?

A. It is a part of the vouchers here, I suppose; I cannot tell you everything there was. [31—17]

Q. All right; if you don't know we will pass on them, but you art now claiming $666?

A. Yes, sir.

(Testimony of Charles A. Quackenbush.)

Q. Who drew those plans?

A. An architect by the name of Josenhaus.

Q. Did you see him draw them?

A. Yes, most of it.

Q. When did he draw them?

A. He was working on the plans two or three months, off and on. Q. About when?

A. From about the time we first made the contract; he worked on the details until the building was finished.

Q. Mr. Quackenbush, you paid the bills and payrolls that are shown on page 1 of the bill of particulars for the company, did you not—the total of those bills there aggregating, as you claim, $27,931.59; you contracted those, that is, and paid them, did you?

A. Yes sir.

Q. Did you pay the bill of the American Paint Company? A. No, sir.

Q. Did you pay the bill of the Alaska Electric Light and Power Company?

A. No, sir; no; part of it only.

Q. The entire bill that is shown on page 2?

A. No, I don't think so.

Q. You didn't pay any of that. Did you pay any of the Juneau Iron Works' bill? A. No, sir.

Q. Any of the Newman and Marshall bill?

A. No, sir.

Q. Any of the telephone bill?

A. No. [32—18]

Q. Why didn't you pay those?

A. Mr. Valentine asked me if it was agreeable for

(Testimony of Charles A. Quackenbush.)

him to pay them so long as I got my commission on them.

Q. When did he ask you if it was agreeable for him to pay them?

A. When the first payment was made to the Juneau Iron Works.

Q. When was that?

A. I don't know the dates; I think about September.

Q. You think it was about September?

A. When the roughing in was done for the heating.

Q. You mean to tell the jury that Mr. Valentine asked you on that occasion if it would be agreeable for him to pay them? A. Yes, sir.

Q. Whereabouts did that occur?

A. In Mr. Valentine's office.

Q. Who was there?

A. Mr. Valentine and myself.

Q. Anyone else? A. I don't think so.

Q. On this occasion he asked you if it was agreeable to you for him to pay these bills?

A. Yes, sir.

Q. I suppose you consented? A. Yes.

Q. You testified on yesterday about some man working on these plans from before they began the building until about the time it was through with—is that correct—take him that long to finish them?

A. Off and on; there was some of the details that wasn't required until the work caught up—minor details.

(Testimony of Charles A. Quackenbush.)

Q. When did he have the blue-prints made? **[33—19]**

A. For the building?

Q. Yes.

A. The blue-prints for the main building was gotten out—I think the blue-print for the foundation was gotten out first.

Q. Well, when were they completed?

A. Well, real early; I don't remember the exact date; in time to start the work.

Q. Who was this man that worked on them?

A. Josenhaus.

Q. And he worked in the shop?

A. He done all the work in the office.

Q. Down at your shop?

A. No, sir; my office was then in Mr. Forrest's building.

Q. In the old Juneau Iron Works' building?

A. Yes.

Redirect Examination.

Q. Where is Mr. Josenhaus from? A. Seattle.

Q. What is his regular occupation?

A. He is an architect; he has been, I think, for twenty years in Seattle.

Q. What is his standing down there, do you know?

A. His standing is the very best; he is now building inspector for the city of Seattle.

Q. About how long was he working on this job?

A. He was working off and on there for about three months—not continually, you know; as the

(Testimony of Charles A. Quackenbush.)

plans were needed; we had considerable other work for him.

Q. In your statements made from time to time prior to this bill of particulars which you furnished, did you ever fail to charge the ten per cent to him?

A. Never did; no, sir. **[34—20]**

Q. Each month as you made up a statement, the ten per cent was added to the items which you rendered in those monthly bills? A. Always.

Q. Were those bills paid in full by Mr. Valentine?

A. I don't think there was ever a bill paid in full; the fore part of the construction work, the first two or three payments that Mr. Valentine made, I would ask for a thousand dollars, or $1,500, or two thousand and get it and that was all there was to it. I had begun to render statements every month, and if the bill was for $1,300, or something like that,—I don't remember the exact amounts—he would give me a thousand, or something like that; toward the last *be* begun to pay a little, five hundred or a thousand, until it accumulated quite a balance.

Q. Now, Mr. Quackenbush, you stated in your examination yesterday by Mr. Cobb something about the man who—originally discussed this contract with Mr. Valentine— was there ever any written contract?

A. Never was a written contract; in fact, I never had a written contract on a percentage job.

Q. Who was the man who first discussed the deal with Mr. Valentine?

A. The man who really made the deal with Mr.

(Testimony of Charles A. Quackenbush.)

Valentine was Mr. Mill.

Q. Where is he?

A. Mr. Mill is dead now—died about a month ago.

Q. Has he been living here?

A. He did live here; he left here, I believe, four or five months ago.

Q. As the work progressed, the terms of this contract were discussed between you and Mr. Valentine in making **[35—21]** up your statements?

A. It has come up in different ways so many times that I never dreamed of any dispute over it. One little instance—I had some men put in the sidewalk door out in the cement sidewalk there, and the plans showed the door running crossways of the sidewalk, like they always do, but when the door is open it blocks the way—they cannot walk through, and I put the door the other way, and Mr. Valentine made quite a fuss over it and says: "How do the plans show?" The plans did show the other way—he said, "I want it according to the plans"; said, "What am I paying for those plans for"? I never expected any dispute over the plans—it was thoroughly understood.

Q. Never been any dispute over the ten per cent?

A. Never any dispute.

Q. And until this suit was brought there was no dispute about the prices or the dealer's discount?

A. Not whatsoever; no, sir.

Q. No difference of opinion at any time prior to this suit expressed between you and Mr. Valentine as to the terms of the contract?

(Testimony of Charles A. Quackenbush.)

A. None whatever—not at all.

Recross-examination.

Q. When was the first time that you ever made a claim on Mr. Valentine to pay for these plans?

A. Well, when the building was completed.

Q. When was that?

A. I don't remember the exact date; the final statement will show; I wasn't entitled to it until the building was completed. **[36—22]**

Q. Now, when did you complete the building down at the corner of Franklin and Front?

A. Why, I don't remember the exact date, but about the first of June, as near as I can remember—somewheres about there.

Q. What was the cost of the work you did down there? A. Why, it was something over $6,000.

Q. What is that?

A. Something over $6,000; I don't recollect the amount.

Q. Does that include your commission?

A. Yes, sir.

Q. Could you give that exactly?

A. I think Mr. Paine could give it to you there.

Mr. PAINE.—$6,355.30.

Q. Now, that includes your commission on it, does it not? A. Yes, sir.

Q. Is that correct? A. I think so.

Q. How much work on the Valentine store—the repair of that? A. The jewelry store?

Q. Yes.

Mr. PAINE.—$520.19.

(Testimony of Charles A. Quackenbush.)

Q. That included your commission?

A. Yes, sir.

Q. That makes $6,875.49. Now, what was the total cost, exclusive of your commission, of the Valentine Block? A. $33,548.00—total cost.

Q. Yes.

A. $33,548.

Q. $33,000?

A. That was including the sundry accounts and everything.

Q. I am talking about your work. [37—23]

A. My work?

Q. Yes; what you expended.

A. $27,931.59.

Q. Then, you claim that you paid out on the three buildings $34,807?

A. $33,548, ain't it, Mr. Cobb? Myself you mean?

Q. You said you spent $27,931.59 on the Valentine block?

A. Yes, sir; and the cost of the Arctic block was $6,455—I think that included the commission—and the jewelry store $520.19, including the commission.

Q. Now, what was the Valentine block, including the commission? A. $27,931.59.

Q. Well, can you give it to me exclusive of your commission?

A. Take the commission off of there?

Q. I don't want to confuse you, Mr. Quackenbush. You have charged there for the total work, including your commissions and everything—you have got the entire amount of work that you have done, in-

(Testimony of Charles A. Quackenbush.)

cluding your claim for 12½ per cent on the Valentine building, and the 10 per cent on the others, and the money that you paid out altogether you say amounts to $31,953.29, less the sums that you concede you are mistaken about. Now, assuming that you are correct, how much did the Valentine block cost?

A. You mean without the commission?

Q. Yes.

A. $29,003, I think.

Q. That would make more than $38,000.00 on your whole bill. A. $29,633.00.

Q. Aren't you mistaken about that?

A. I don't think so. **[38—24]**

Q. Twenty-six thousand?

A. You mean the material and pay-roll, exclusive of the commission or sundry accounts?

Q. Yes, sir.

A. $26,673.30.

Q. Well, now, add your $6,875.49 to that and see how much you have. You have a larger sum than you claim—you must be in error about that.

The COURT.—Mr. Cobb, you want to find out how much the Valentine block cost exclusive of his commission?

Mr. COBB.—Exclusive of his commission.

The COURT.—Including the plans?

Mr. COBB.—No; I want to find out, if I can, what he is basing his calculation of these plans on.

The COURT.—Now, you want to find out what the cost of the Valentine block was, exclusive of commission, exclusive of plans and also exclusive of sundry items?

(Testimony of Charles A. Quackenbush.)

Mr. COBB.—Yes.

The COURT.—You want to find out, as I understand it, what the Valentine block cost exclusive of his commissions, exclusive of the cost of the plans and exclusive of these items here that are called sundry items?

Mr. COBB.—Yes.

The COURT.—How long will it take you to calculate that, Mr. Quackenbush?

A. Just a second, Your Honor. Well, that is correct, Mr. Cobb; $26,673.30 is what I based the claim on for the 2½ per cent—no, that includes sundry accounts though.

Q. That includes the sundry accounts that Mr. Valentine paid? A. Yes, sir.

Q. That you had nothing to do with. Now, what was the **[39—25]** amount of those?

A. That was $5,617.20—$21,056.30.

Q. That is money that you spent on the building?

A. Yes, sir.

Q. Including the labor and everything; and for the expenditure of that money and the superintendence of the work of that man, you want this jury to give you in addition to 10 per cent, $666 more for plans?

A. For the architectural work; yes, sir.

[Testimony of Emery Valentine, in His Own Behalf.]

EMERY VALENTINE, defendant, testified in his own behalf as follows:

Q. Did you become acquainted with the Juneau Construction Company in the latter part of the year 1913?

(Testimony of Emery Valentine.)

A. About in April, I think, of that year.

Q. Do you know who composed the company at that time? A. Yes.

Q. Who were they?

A. Mr. Mill, Mr. Quackenbush and Mr. Bush.

Q. Mr. R. J. F. Mill? A. Yes, that is the one.

Q. Tom Bush and the plaintiff in this case?

A. Yes, sir.

Q. About that time did you have any business with the concern? A. Yes, sir; I did.

Q. With which member of the copartnership did you deal? A. With Mr. Mill.

Q. Now, I want you to state to the jury what was the nature of your dealings with Mr. Mill representing the Juneau Construction Company.

A. I first employed him to build a place for me known now as the Arctic Hotel and billiard room; that is the junction **[40—26]** of Front and Franklin *Street.* I believe I engaged him to do that job first, and when that was about through, why then I entered into an agreement with him to put up the building at the corner of Seward and Front.

Q. What is known as the Valentine building now, in which your jewelry store is? A. Yes.

Q. And did you engage him to do any repairing of other buildings? A. Engage him?

Q. The Construction Company.

A. Engaged Quackenbush afterwards along in the fall.

Q. After Mr. Mill withdrew from the firm. Now, tell the jury the terms of the contract or agreement

(Testimony of Emery Valentine.)

in regard to these two buildings.

Mr. SHACKLEFORD.—We object to that as calling for a conclusion of the witness—let him state what was said.

The COURT.—It is admitted in the pleadings that there was a contract.

Mr. COBB.—I will just limit it to these particular accounts and we will get along more rapidly.

Q. In the course of your making this contract with them, was anything said about the plans on which the building was to be constructed?

A. About the plans?

Q. Yes, of the Valentine building?

A. Yes; that was my first talk with Mr. Mill.

Q. Now, what was said in regard to it?

A. He said; "We will draw the plans for your building—plans and specifications; we will furnish them to you for 2½ per cent"; he said, "If you will give us [41—27] the job of putting up the whole building, why, we will furnish the plans and specifications and we will purchase the materials we use and superintend the construction for 10 per cent."

Q. Did you have any plans in view at that time?

A. I had two sets that had been previously drawn by others.

Q. Did you furnish him those plans?

A. Yes, sir; he took those plans and I never got them back.

Q. Was the contract for the erection of this building that you finally entered into with Mr. Mills in accordance with those plans you furnished?

(Testimony of Emery Valentine.)

Mr. SHACKLEFORD.—We object to that as leading; let him state what was said.

The COURT.—Yes; let him state what was said.

Q. State what was said then, in regard to the building and the compensation.

A. And altering the plans I brought to them and furnished them?

Q. Yes.

A. Well, there were some minor changes to be made; for instance, the room for the furnace was about twice as large as it should be, and we reduced that; the plan of the front door there at my place was directly in the corner, and we moved that to another place; and the Mecca Saloon there, there was a concrete floor put in the toilet-room of the Mecca Saloon that wasn't in my plans that I furnished them.

Q. Was that about all the changes made?

A. That was about all the changes made.

Q. Now, the building—I will ask you, with the exception of these changes, the building was put up in accordance with the plans you already had?

A. Yes; just excepting those few little changes. **[42—28]**

Q. What was the agreement, if any, as to the compensation the Juneau Construction Company should have for its work on this building?

A. Why, they should furnish all the plans, or the corrections anyway, on the plans I had—were to furnish those plans and specifications for that building, purchase material such as they used upon it, pay for the labor that they employed on it, and for all that

(Testimony of Emery Valentine.)

they were to have ten per cent.

Q. Of the total cost?

A. No, not the total cost of the building; of what they paid out.

Q. Now, was there anything said in regard to subsidiary contracts, such as the heating plant, and *so?* I will ask you, first, before reaching that if these plans provided for the heating?

A. One set—drawn by Mr. Shroeder—did.

Q. Was anything said between you and Mr. Mill especially regarding the subcontracts?

A. Yes—yes, sir.

Q. Tell the jury what that was.

A. Now, I told him, "You are to draw these plans complete"—he was to figure out there the number of feet of radiation, and so on, and I said, "I will have that put in myself," and I said, "those subcontracts, those you are not to include in your charges." "No, no," he said, "what we do is what we will charge you for."

Q. Did you ever have any conversation with Mr. Quackenbush at all in regard to this contract?

A. Never a word with him. One day I went down to his office; that was the first time, I believe, I saw the man. I asked him about the plate glass for the front, [**43—29**] and this man talked up big and said that the plate glass would be set in for $71 a sheet, and he could get concrete for $2.15 a barrel, and said, "We can save you a great deal more than all of our commissions in the way of discounts; we can buy things for you and save you the discount."

(Testimony of Emery Valentine.)

That is the only conversation I have with that man until about the time Bush went into the interior and Mill went below and the partnership dissolved; and those are the only two times that I ever talked to that man about anything.

Q. You heard his testimony on the stand that you stated in the door of your store what the contract was—did you ever have such a conversation with him?

A. No, sir; I had no such conversation with him.

Q. When Mr. Mill withdrew from it, the plaintiff, Mr. Quackenbush, did attempt to carry out the construction of the building and finish it up?

A. Yes, he came to me about that time.

Q. State to the jury what occurred then.

A. He came to me and said that Tom was going into the interior and Mill was sick and he had bought them out, and he said, "Will it be all right if I go ahead and carry out this job?" And I said, "Oh, of course that will be all right; I want to get it done as soon as we can"; and he said, "All right; we will *lit* into it and do it all"—that is the words he used.

Q. Did you have any conversation at that time with reference to the contract that you had made with Mr. Mills?

A. No, not a thing; that was all; he asked me if he might go ahead with the building.

Q. You just assumed that he knew what Mr. Mills' contract was? [44—30]

A. Yes; I supposed he knew.

Q. Now, I refer to page 1 of the bill of particulars

(Testimony of Emery Valentine.)

where you are charged with $561.72, 10 per cent commission on sundry accounts. Tell the jury whether or not that is a proper charge against you; and if not, why not.

Mr. SHACKLEFORD.—That is leading and calls for a conclusion of the witness.

The COURT.—Well, as to whether it is a proper charge or not is a conclusion; you may ask him what was said and done about it.

Q. Well, what was said and done, when you made the contract with Mr. Mills, in regard to commission on the sundry accounts?

A. Let me see first for sure what is sundry accounts.

Q. There are the sundry accounts—American Paint Company, $800; Alaska Electric Light & Power Co., $550.50; Juneau Iron Works, $2,972.50; Marshall & Newman, $1,177.20; Telephone Company, $117; aggregating $5,617.20. Just explain that to the jury.

A. Now, what is the question?

Q. Just explain that whole matter to the jury in regard to these sundry accounts—who you object to that charge.

A. These accounts are subcontracts, entered into by me, which I paid for—made the contracts and did the whole thing, and they had nothing whatever to do with this, the company Quackenbush represented; they were fully independent of their work, and independent of them entirely; excepting, according to the agreement there Mr. Mills should do any

(Testimony of Emery Valentine.)

figuring out for the heating plant, the size of the registers and the size of the furnace; he agreed the same with the plumbing, Marshall [45—31] & Newman's bills, and the Telephone Company; they had nothing to do with it one way or the other—never spoke to them at all about it.

Q. Was there anything said between you and Mr. Mill at the time you made the contract that you were going to take care of those yourself.

A. Those are subcontracts. That was mentioned —I said, "Those are subcontracts," and he said, "All right."

Q. Nothing said as to whether he was to have a commission on them or not?

A. No, those were to be independent.

Q. Now, I believe you testified yesterday in regard to the plans for the block?

A. I would like to state first what some of this work is for.

Q. What is it for?

A. Why, the American Paint Company—for instance, some painting and paper-hanging is included in that bill that was done up at my residence; Alaska Electric Light and Power Company, has included in there some fixtures up to my residence, and also my chandelier and fixtures in the store there that I bought, and they had nothing to do with any of those matters at all.

Cross-examination.

Q. Mr. Valentine, I understand you to say the first time you had any conversation with Mr. Quacken-

(Testimony of Emery Valentine.)

bush about this work was at the time Mr. Bush and Mr. Mill had withdrawn from the firm?

A. Oh, no; I didn't say anything of the kind; I said the first time that ever I talked with Quackenbush was when I went down to the office there; it was just at [46—32] the time they were working on the Arctic, started there, and I asked the man about the plate glass in the front and he took out a little book and said that the plate glass would be $71 a sheet; that is the first words that he ever said to me in connection with this building, whatever, or any other building.

Q. And that was about what time, Mr. Valentine?

A. It must have been somewhere around the latter part of April or the first part of May.

Q. When was it they commenced to work on that block?

A. They commenced work on the block—well, now, I cannot give the date of that, but they were still tearing down, my workmen were, on June 4th.

Q. Did you complete the wrecking of the old building yourself?

A. Yes, sir; took those all down at my expense, and gave them the lot cleared.

Q. Did they do anything with that portion of what is now known as the Valentine block which was already erected?

A. The part that the Gastineau Company had, you mean?

Q. Yes. A. Yes.

Q. What did they do in reference to that?

(Testimony of Emery Valentine.)

A. They lowered that down eight inches.

Q. Had to block it up and then had to saw off the underpinnings or pillars?

A. No, they put in new concrete piers in there.

Q. And let it down on those?

A. Let it down eight inches where it is now.

Q. Had you met Mr. Quackenbush before that—did you know him or were you acquainted with him?

A. Yes, I had met him several times.

Q. Knew he was a member of the firm? [47—33]

A. Oh, yes; when I talked with Mr. Mill—all of my dealing was with Mr. Mill—I said, "I will talk to you entirely about this thing; I won't talk with any of the other members of the firm; I will do all of my talking to you, and then there will be no chance of a misunderstanding"; he said, "I think that is right," and there was no second, I never talked with Mr. Bush or Mr. Quackenbush, did all my talking with Mr. Mill.

Q. About what time was it that Mr. Quackenbush called on you and told you the other members of the firm had retired?

A. It must have been some time in July, toward the latter part of July, I think; I am not going to give that definitely as the date, but I think that was it, judging from the time of the Shushanna strike in the interior.

Q. Now, Mr. Valentine, referring to the bill of particulars, your first objection is to 90 pounds of large-head galvanized roofing nails?

A. No, that is not the first.

(Testimony of Emery Valentine.)

Q. What is the first objection?

A. It is on page 1.

Q. What is that?

A. 10 per cent on the sundry accounts, $561.72.

Q. Your agreement with Mr. Mill, then, was in this condition, that he would start in to build the building, and whatever contract you wanted to let, why, you could let them personally, and there would be no percentage on those contracts?

A. For those things, of course, it was understood between us that this is a separate part from building; builders are the men, as I understand, that buy the lumber and do the carpenter work and so on; that was agreed between [48—34] him and I, that any subcontract that I let wasn't included in the cost of the building that he got his 10 per cent on.

Q. He was to receive 10 per cent on—

A. Whatever was furnished through him or his company.

Q. In other words, if you closed a subcontract, that was excluded from his commission?

A. If I chose to.

Q. Yes.

A. I don't clearly get that; what do you mean by that?

Q. Anything you saw fit to subcontract was not subject to the commission—that is what you want the jury to understand, isn't it?

A. Anything that was handled through the company—for instance, the painting, that would be a subcontract.

(Testimony of Emery Valentine.)

Q. That wasn't in his commission at all?

A. No, not a cent, as it was handled through me; it was what was handled through him or through his company that he got a commission on.

Q. If there was any particular branch of the work that you chose to take up and subcontract, then that would be out of the builder's control and they would not have anything to do with it?

A. It was understood about what we were to do, because I spoke to him to give me the radiation, the number of feet it would require, the size of the furnace, and so forth—

Q. That was in regard to the Forrest contract you had already let? A. No, which he agreed to do.

Q. Had you let all the other sundry contracts?

A. No, we hadn't let any, we let the plumbing afterwards. **[49—35]**

[Testimony of George R. Marshall, for Plaintiff.]

GEORGE R. MARSHALL, being duly sworn for the plaintiff, testified as follows:

Q. Mr. Marshall, you live here in Juneau?

A. Yes, sir.

Q. What are your initials?

A. George R. Marshall.

Q. Did you have a contract in reference to construction upon the Valentine Block in 1913?

A. I did.

Q. How did you get it—were bids asked for?

A. Why, Mr. Mills at that time, he was drawing the plans, I believe, and *ha* handed us the plans and the specifications, and we turned in the bids to Mr. Mills.

(Testimony of George R. Marshall.)

Q. Did you go over to Mr. Valentine with your bid, or hand it to Mr. Mill personally?

A. I handed it to Mr. Mills.

Q. Did you have any talk with Mr. Valentine about seeing Mr. Mills?

A. I had talked with Mr. Valentine before that; we were talking over—

Q. How did you happen to go to Mr. Mills with it?

A. Naturally all the plumbers in town knew that building was going up, and Mr. Mills, I think, was drawing the plans at that time.

Q. Who told you he was drawing them—do you remember who sent you to Mr. Mill?

A. Mr. Valentine did.

Mr. SHACKLEFORD.—You may cross-examine.

Cross-examination.

Q. Mr. Valentine sent you to Mr. Mill to see the plans, did he?

A. If I remember right, I was talking to Mr. Valentine [50—36] one time, or my partner, Mr. Newman; and he simply said at that time Mr. Mill had the plans and to go over there; he had the plans and specifications, and we turned the bid in to Mr. Mills.

Q. Who did you make the contract with?

A. We didn't have exactly what you call a drawed-up contract; we have our own sort of bid we turn in.

Q. Who accepted your bid?

A. Why, it was first through Mr. Mill's place we had it, and later Mr. Valentine told me we had it; it seems as if, as I understand it, we was a little higher

(Testimony of George R. Marshall.)

than a party in town here, and we went to Mr. Valentine and asked him, and he told us certainly we had the job, and he was the party who gave us authority to go ahead on it.

Q. Who paid you? A. Mr. Valentine.

Q. As a matter of fact, all that Mr. Mills had to do with it was to show you the plans when you went down there to see them, so you could see what work was to be done, and how it was to be done?

A. He told us that, and laid out the work for us the way he wanted it put in.

Q. And it was done in accordance with the plans and specifications, was it?

A. We had some changes we had to make in accordance with the plans.

Mr. COBB.—That is all.

Redirect Examination.

(By Mr. SHACKLEFORD.)

Q. Did Mr. Quackenbush ever exact any changes in the work as it was laid out? **[51—37]** A. Yes.

The COURT.—Who did you say laid out the work?

A. I said after we was told to go ahead with the work, Mr. Mill and myself, we went over the building and he give us our lines where we could go ahead and run our stacks through, and laid out our lines for the different rooms.

Mr. COBB.—I didn't catch that.

A. Our vent lines and our stacks, or water soil wastes, as we call them; you see, we had to make some changes up in there; we couldn't run down exactly inside of the wall, so we had to go up overhead.

(Testimony of George F. Forrest.)

Mr. COBB.—For what purpose was those changes made?

A. So we could get our stack down without going through the middle of the room.

Mr COBB.—That had nothing to do with the contract itself, or the work under it, did it?

A. Well, according to the plans it showed going straight down, and according to the way we had to do it we had to change it and alter it a little; according to the plans—

Mr. SHACKLEFORD.—Did that involve any extras?

A. No, we didn't charge no extras on that.

Mr. SHACKLEFORD.—That is all. **[52—38]**

[Testimony of George F. Forrest, for Plaintiff.]

GEORGE F. FORREST, being duly sworn in behalf of the plaintiff, testified as follows:

Q. Mr. Forrest, you are engaged in business here in Juneau? A. Yes, sir.

Q. What is your business?

A. Why, general machine-shop business.

Q. You were engaged in putting in steam plants in the year 1913 in the town of Juneau?

A. Yes, sir.

Q. Did you put the steam plant into the Valentine block? A. Yes, sir.

Q. Now, I wish you to tell the jury who you dealt with in that matter—just how the thing occurred.

A. Why, as I remember it, the specifications and contract was made out to Mr. Valentine.

Q. Did you go to Mr. Valentine about getting the

(Testimony of George F. Forrest.)

contract? A. Yes, sir.

Q. State what, if anything, occurred.

A. He told me to go to Mr. Mills—that Mr. Mills was handling the building for him.

Q. Did you go to Mr. Mill about it? A. Yes, sir.

Q. Put your bid in to Mr. Mill or to Mr. Valentine?

A. I don't remember who got the bid, whether Mr. Valentine got it or Mr. Mill, but I did put in the bid and the specifications, as I say; that specification, as I remember it, was made out by Mr. Valentine.

Q. But were you instructed by him to go to Mr. Mill for the information necessary in making your bid? A. Yes, sir.

Q. Did he tell you what company had charge of the building? **[53—39]**

A. Well, now, he didn't say what company—he said Mr. Mill.

Q. That was the time Mr. Mill was with the Juneau Construction Company?

A. He was identified with the Juneau Construction Company at that time.

Mr. SHACKLEFORD.—That's all.

Cross-examination.

(By Mr. COBB.)

Q. In other words, Mr. Forrest, you had to go to Mr. Mill to see the plans? A. Yes, sir.

Q. You say you recognized and dealt, in making that bid, contract, and so forth, with Mr. Valentine?

A. Yes, sir.

Q. Mr. Valentine paid you? A. Yes, sir.

Mr. COBB.—That's all.

Mr. SHACKLEFORD.—You dealt with both parties in the matter? A. Yes, sir.

And the above and foregoing was all the testimony produced by both parties relating to the items of 10 per cent on sundry accounts and 2½ per cent for plans of building, but does not include the testimony relating to the other and remaining items in the Bill of Particulars.

And thereupon the defendant, in writing and before the argument began, requested the Court to instruct the jury as follows:

[Instructions to Jury Requested by Defendant.]

"In arriving at your verdict herein, you will wholly disregard the charge made against Mr. Valentine by the **[54—40]** plaintiff for $666.82 for plans of of block. There is no evidence that the plaintiff expended any money or was put to any cost on account of such plans, and the 2½ per cent on the total cost of the building, which the plaintiff claims he was entitled to, to make up such item, is not embraced in the terms of the contract."

But the Court refused said request, to which ruling of the Court the defendant then and there excepted.

And the defendant before the argument began further requested the Court in writing to instruct the jury as follows:

"You will also disregard the charge made against Mr. Valentine of $561.72 for 10% on sundry accounts, as that item is not within the terms of the contract as admitted by the plaintiff."

But the Court refused said request, to which ruling of the Court the defendant then and there excepted.

And thereupon the Court instructed the jury as follows:

[Instructions of Court to Jury.]

"Gentlemen of the Jury:

This is an action brought by the Juneau Construction Company—that is, Mr. Quackenbush—against Mr. Valentine to recover the alleged value of certain materials and labor alleged to have been furnished at his instance and request, and also a certain percentage thereon alleged to have been agreed upon between the parties.

A bill of particulars of the items charged for has been demanded and furnished. Some of the items of the bill of particulars have been admitted by not being denied, and some have been questioned in whole and in part—some of the questioned items have been admitted *in toto*—some **[55—41]** have been denied *in toto,* and some have been in part admitted and in part denied, so that, even if there were no question of law involved, it would be no easy task to make a summary of the charges and countercharges, admissions and denials.

There are three buildings figuring in this lawsuit,—

(1) Remodelling of a certain store owned by Mr. Valentine.

(2) The building of the Arctic poolroom.

(3) The building of the structure known as the new Valentine block.

It will be better if you consider these three buildings separately.

It is claimed by plaintiff that, including the commission of ten per cent, the total amount paid out by Quackenbush and to which he was entitled on the remodelling of Valentine's old store is $520.19, and that what Quackenbush paid out, together with his ten per cent, in the matter of the Arctic poolroom, is $6355.30. This makes a total of $6875.49 for those two buildings. You will ascertain from the evidence if that amount is correct, and, if not, what the amount should be.

Now, find out, if possible, what the claim is as to the cost of the new Valentine building,—that is, exclusive of all percentage, plans and "sundry items," and what sum you think the evidence shows.

The plaintiff claims, and has offered evidence to prove, that the value of the materials and labor which entered into the construction of the building (exclusive of all percentage and plans, and exclusive of what is called "sundry items" at the top of page 2 of the bill of particulars) was $21,186.61. **[56—42]**

DEDUCTIONS.

Now, as before stated, some of this amount is undisputed—if it were all undisputed you should consider those figures as the true figures of the cost of the new Valentine building.

It was discovered, however, that certain items charged were duplications—that is, they were

charged twice when they should only have been charged once. The amount of the items which were discovered to be duplicate, was $107.70.

It has also been admitted that the said sum of $21,186.61 included the following items, which it is admitted did not enter into the construction aforesaid:

Credits given on July statement not on bill of particulars	$ 69.45
Tiling	3.75
Mirrors, Suess Glass Co.	19.40
Sundry items, page 69	4.88
Error, Hanby Bill	27.00
Red Rosin Paper	16.80
Hauling four loads of gravel	4.00
100 feet of hose returned, ½ value	15.00
124 sacks cement—31 barrels 6⅕ tons @15.00	93.00
Making a total of	$360.98

I instruct you as a matter of law, that under the evidence in this case, plaintiff is not entitled to charge as entering into the construction of the building any wages for Mr. Bush, Mr. Mill or Mr. Quackenbush. The amounts charged as the wages of these three gentlemen are as follows: **[57—43]**

T. F. Bush.....116.25
R. J. F. Mill..... 30.75
75.00
90.00
74.25
C. A. Quackenbush.....19.60
.20 error

$406.05

This makes the grand total of conceded and instructed deductions $766.83. When these deductions are made, it leaves the plaintiff's claim as to the value of the materials and labor, exclusive of percentage and of the value of the plans, entering into the construction of the Valentine building, and exclusive of the sundry items $20,419.78.

But the defendant says that the foregoing are not all the deductions which should be made in order to ascertain the true cost of said building. This sum of $20,419.78 includes items such as cement, glass, lumber, steel, etc., which Valentine claims did not go into the building at all.

Upon the issue as to what went into the building and what did not, the burden of proof is upon the plaintiff to show the correctness of all the charges he has made, and if you find from the evidence that the defendant has been charged with any material not used, you are to allow Mr. Valentine credit for all such material, and calculate the amount thereof at the rate charged for such material in the plaintiff's account.

Now, when said sum of $20,419.78 has suffered the deductions which the Court has instructed you should be made as a matter of law and those deductions, if any, **[58—44]** which you think should be made on account of failure of any items charged for to enter into the construction of the building, there will be left a certain sum, the magnitude of which will depend upon the amount of the deductions made. Now that sum will represent the cost of the new Valentine building, exclusive of percentages, plans and sundry items.

The Court further said:

PERCENTAGE.

Now, having determined the cost of the Valentine building, exclusive of percentages, plans and sundry items, you are to add thereto 10% as compensation for superintending as per contract.

Now, plaintiff claims that in addition to 10 per cent on that amount he should also have a commission of 10 per cent on the "sundry items."

Plaintiff claims that the contract was that he should have a commission of 10 per cent upon the total cost of the building; while defendant contends that the contract was that plaintiff was only to have a commission of 10 per cent upon such material and labor as was purchased and furnished by plaintiff, and defendant says that the accounts called "sundry accounts" (which you find on page 2 of the bill of particulars) amounting to $5,617.20, are materials and labor not furnished by or through the plaintiff, and that plaintiff had nothing to do with them, but

that the defendant transacted that business himself, and that plaintiff is not entitled to any commission thereon. Now, you are the judges as to what this contract was. If you find from a preponderance of the evidence that plaintiff was to have 10 per cent on the total cost of the building, then you will allow him 10 per cent **[59—45]** on the cost of those materials, labor and so forth furnished by him, and 10 per cent on the value of the "sundry accounts"; but if you find that the contract was that he was only to have ten per cent on such material and labor as was furnished by him, then you must not allow him any percentage on the sundry items. In other words, unless you find from the preponderance of the evidence that the defendant Valentine agreed to pay the Construction Co. 10 per cent upon the bills of the American Paint Co., Alaska Electric Light & Power Co., Juneau Iron Works, Marshal & Newman, and the Telephone Co. (known as "sundry accounts"), you will allow no percentage thereon; that is to say, the question for you to determine is whether or not the contract as made between the plaintiff and the Construction Co. provided for Valentine paying the Construction Co. 10 per cent on these sundry accounts, and upon that issue the burden of the proof is upon the plaintiff."

To which instruction the defendant then and there excepted, and the Court further instructed the jury as follows:

PLANS.

"Plaintiff claims that in addition to his claim for

material and labor, and for percentage thereon, he is entitled to 2½ per cent on the cost of the new Valentine building for the work and labor of preparing plans for the work of construction. Plaintiff says that defendant agreed that the 2½ per cent was a reasonable sum to charge for the plans, and that it should be so charged, whereas the defendant claims that the contract was to the effect that if plaintiff did not do the work of building he was to have 2½ per cent, but that if he did get the job of superintending the building, he was not to charge anything for the plans. **[60—46]**

Now, you have heard the evidence on both sides, and it is for you to decide from that evidence what the contract was as to the plans. If you decide that the contract was to pay 2½ per cent of the cost of the building for the plans, then you will compute 2½ per cent on the total cost of the buildings, including the sundry items, and allow that amount also to plaintiff; if you decide that the contract was as Mr. Valentine alleges it to have been, then you will make no addition for or on account of the plans."

To which instruction defendant then and there excepted.

"Now, then, you add whatever you shall have found the other two buildings (together with 10 per cent thereon), *amounted, and* ascertain the difference between that sum and $26,932.37 (admitted to have been paid), and that difference will be the sum for which your verdict should be.

If that difference is in favor of the plaintiff, your

verdict will be for him for that amount; if that difference be in favor of defendant, your verdict will be for him for that difference."

Filed in the District Court, District of Alaska, First Division. Sep. 20, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. **[61—47]**

[Order Approving and Allowing Bill of Exceptions, etc.]

And because the above and foregoing does not appear of record, I, Robert W. Jennings, the Judge before whom said cause was tried, do hereby approve and allow the foregoing bill of exceptions, and order the same to be filed as a part of the record in said cause. At this time and place, however, the plaintiff appeared and objected to the settlement of said bill of exceptions on the ground that same was not done within the time allowed by law and the rules and orders of this court. In that connection I do further certify that the prior action of this court in the matter of said bill of exceptions is wholly found in the following orders appearing in the journal of said court, to wit:

July 15, 1915: "Upon application of the defendant, good cause therefore being shown.

It is ordered that the time for settling and filing a bill of exceptions herein be and the same is hereby extended to September 1st, 1915."

August 26, 1915: "On oral stipulation, in open court, of W. S. Bayless, Esquire, of counsel for plaintiff, and J. H. Cobb, Esquire, attorney for defendant, it is ordered that the time for settlement of the Bill

of Exceptions herein be, and the same is, hereby extended to October 1, 1915."

September 20, 1915: "On oral motion of William S. Bayless, Esquire, of counsel for plaintiff, and J. H. Cobb, Esquire, attorney for defendant, being present and consenting thereto, the plaintiff is allowed one month from this date in which to propose amendments to defendant's Bill of Exceptions this day filed herein."

October 19, 1915: "Thereupon this Special February, 1915, term of this court is adjourned *sine die.*"

Dated this 29th day of December, 1915.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 29, 1915. By J. W. Bell, Clerk.

By ————, Deputy. **[62]**

In the District Court for Alaska, Division Number One, at Juneau.

#1153–A.

CHARLES A. QUACKENBUSH,
Plaintiff,

vs.

EMERY VALENTINE,
Defendant.

Petition for Writ of Error.

Emery Valentine, defendant, conceiving himself aggrieved by the final judgment of the Court, in the

above-entitled cause, and having filed his Assignment of Error herein, prays the Court to allow him a Writ of Error from the Honorable the U. S. Circuit Court of Appeals for the Ninth Circuit, and to fix the amount of security which he shall give as a supersedeas to said judgment on such Writ of Error.

J. H. COBB,

Attorney for Emery Valentine.

WRIT OF ERROR ALLOWED: Supersedeas Bond fixed at Six Thousand Dollars.

Dated this 5th day of June, 1915.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. K, page 404.

Filed in the District Court, District of Alaska, First Division. Jun. 5, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. **[63]**

In the District Court for Alaska, Division Number One, at Juneau.

#1153–A.

CHAS. A. QUACKENBUSH,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Assignment of Errors.

Now comes the defendant and assigns the following errors committed by the trial court during the progress of the trial, and in the rendition of the final

judgment herein, and upon which the defendant will rely in the Appellate Court.

I.

The Court erred in admitting in evidence the testimony of the plaintiff tending to show that the contract between the Juneau Construction Company and the plaintiff provided for a commission of 2½% on the cost of the Valentine building "for plans" in addition to the 10% of such costs for the services of the said Company.

II.

The Court erred in admitting in evidence the testimony of the plaintiff tending to show that by the terms of the contract between the Juneau Construction Company and the plaintiff the said company was to be paid 10% on the cost of the "sundry bills" or on the cost of work done by others and with which said Construction Company had no connection.

III.

The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

"In arriving at your verdict herein, you will wholly disregard the charge made against Mr. Valentine by the plaintiff for $666.82 for plans of block. There is no evidence that the plaintiff expended any money or was put to any cost on account of such plans, and the 2½% on the total cost of the building, which the plaintiff claims he was **[64]** entitled to, to make up such item, is not embraced in the terms of the contract."

IV.

The Court erred in refusing the prayer of the de-

fendant to instruct the jury as follows:

"You will also disregard the charge made against Mr. Valentine of $561.72 for 10% on sundry accounts, as that item is not within the terms of the contract as admitted by the plaintiff."

V.

The Court erred in instructig the jury as follows:

"Plaintiff claims that the contract was that he should have a commission of 10% upon the total cost of the building; while defendant contends that the contract was that the plaintiff was only to have a commission of 10% upon such material and labor as was purchased and furnished by plaintiff, and defendant says that the accounts called "sundry items" (which you will find on page 2 of the bill of particulars) amounting to $5,617.20, are materials and labor not furnished by or through the plaintiff, and that plaintiff had nothing to do with them, but that the defendant transacted that business himself, and that plaintiff is not entitled to any commission thereon. Now you are the judges as to what this contract was. If you find from a preponderance of the evidence that plaintiff was to have 10% on the total cost of the building, then you will allow him 10% on the cost of those materials, labor, etc. furnished by him, and 10% on the value of the "sundry accounts"; but if you find that the contract was that he was only to have ten per cent on such material and labor as was furnished and supervised by him, then you must not allow him any percentage on the "sundry items"—in other words, unless you find from the preponderance of the evidence that the

defendant Valentine agreed to pay the Construction Company 10% upon the bills of the American Paint Co., Alaska Electric Light and Power Co., Juneau Iron Works, Marshall and Newman, and the Telephone Co., [65] (known as "sundry accounts"), you will allow no percentage thereon: That is to say, the question for you to determine is whether or not the contract as made between the plaintiff and the Construction Co. provided for Valentine paying the Construction Co. 10% on these "sundry accounts," and upon that issue the burden of proof is upon the plaintiff."

VI.

The Court erred in instructing the jury as follows:

"Plaintiff claims that in addition to his claim for material and labor, and for percentage thereon, he is entitled to 2½% on the cost of the new Valentine building for the work and labor of preparing plans for the work of construction. Plaintiff says that defendant agreed that the 2½% was a reasonable sum to charge for the plans, and that it should be so charged, whereas the defendant claims that the contract was to the effect that if plaintiff did not do the work of building he was to have 2½% but if he did get the job of superintending the building, he was not to charge anything for the plans.

Now you have heard the evidence on both sides, and it is for you to decide from that evidence what the contract was as to the plans. If you decide that the contract was to pay 2½% of the cost of the building for the plans, then you will compute 2½% on the total cost of the building, including the "sundry

items" and allow that amount also to the plaintiff; if you decide that the contract was as Mr. Valentine alleges it to have been, then you will make no addition for or on account of the plans."

VII.

The Court erred in overruling the motion of the defendant to set aside the verdict, because contrary to and not authorized by the instructions of the Court in this; that the verdict allowed interest from May 1st, 1914. [66]

VIII.

The Court erred in entering judgment on the verdict for interest from May 1st, 1914, because such allowance of interest is contrary to the law of Alaska in an action on mutual account until a balance is struck.

And for said errors and others manifest of record defendant prays that the judgment be reversed and the cause remanded.

J. H. COBB,
Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Jun. 5, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [67]

In the District Court for Alaska, Division Number One, at Juneau.

#1153–A.

CHAS. A. QUACKENBUSH,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Judges of the District Court of Alaska, Division Number One, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is before you, wherein, Chas. A. Quackenbush, doing business as the Juneau Construction Co. is plaintiff and Emery Valentine is defendant, a manifest error hath happened to the great damage of the said Emery Valentine as by his petition doth appear.

We being willing, that error, if any hath happened, should be duly corrected and speedy justice done to the parties in that behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things pertaining thereto, to the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco in the State of California, so that you have the same before our said Court on or before thirty days from

date hereof, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what if right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, and the seal of the District Court of Alaska, Division Number One, affixed at Juneau this the 7th day of June, 1915. [68]

[District Court Seal.]

J. W. BELL,
Clerk.

By ————————,
Deputy.

Allowed:

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division Jun. 7, 1915. J. W. Bell, Clerk. By ————, Deputy. [69]

In the District Court for Alaska, Division Number One, at Juneau.

#1153–A.

CHAS. A. QUACKENBUSH,
Plaintiff,

vs.

EMERY VALENTINE,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Emery Valentine as principal and E. L. Pulver and R. P. Nelson as Sureties, acknowledge ourselves to be indebted and bound to pay to Chas. A. Quackenbush, the above-named plaintiff, the sum of Six Thousand Dollars, lawful money of the United States, for the payment of which sum well and truly to be made, we hereby bind ourselves, our, and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

The condition of this obligation however, is such that whereas the above-bound Emery Valentine has sued out a writ of error in the above-entitled cause from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in said cause on the —— day of April, 1915.

Now, if the said Emery Valentine shall prosecute his writ of error to effect, and pay all such damages and costs as may be awarded against him if he fail to make his plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

Witness our hands this the 5th day of June, 1915.

EMERY VALENTINE,
E. L. PULVER,
R. P. NELSON.

Taken and acknowledged before me this the 5th day of June, 1915.

[Notarial Seal]

E. L. COBB,
Notary Public in and for Alaska.

My commission expires Dec. 3d, 1918.

Approved to operate as a supersedeas from the filing thereof.

ROBERT W. JENNINGS,
Judge. [70]

Filed in the District Court, District of Alaska, First Division. Jun. 7, 1915. J. W. Bell, Clerk. By ————, Deputy.

[Endorsed]: No. 1153–A. Chas. A. Quackenbush vs. Emery Valentine. Bond. [71]

[Citation on Writ of Error.]

In the District Court for Alaska, Division Number One, at Juneau.

#1153–A.

CHAS. A. QUACKENBUSH,
Plaintiff,

vs.

EMERY VALENTINE,
Defendant.

CITATION IN ERROR.

United States of America,—ss.

The President of the United States to Chas. A. Quackenbush, and to Messrs. V. A. Paine, and Shackleford & Bayless, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California, within thirty days from the date of this writ pursuant to a Writ of Error in the clerk's office of the District Court

for Alaska, Division Number One, in a cause wherein Emery Valentine is plaintiff and you defendant in error, then and there to show cause if any there be, why the judgment in said Writ of Error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States this the 7th day of June, 1915.

ROBERT W. JENNINGS,
Judge.

[District Court Seal]

Attest: J. W. BELL,
Clerk.

Service accepted this June 7th, 1915.
SHACKLEFORD & BAYLESS and
V. A. PAINE,
Attys. for Defendant.

Filed in the District Court, District of Alaska, First Division. Jun. 7, 1915. J. W. Bell, Clerk. By ————, Deputy. [72]

In the District Court for Alaska, Division Number One, at Juneau.

No. 1153–A.

CHAS. A. QUACKENBUSH,
Plaintiff,

vs.

EMERY VALENTINE,
Defendant.

Praecipe for Transcript [of Record].

To the Clerk of the District Court, Juneau, Alaska:

You will please make up a transcript of the record in the above-entitled cause, and include therein the following papers to wit:

1st. Complaint.
2d. Answer.
3d. Reply.
4th. Judgment.
5th. Bill of Exceptions.
6th. Petition for Writ of Error.
7th. Order Allowing Writ.
8th. Assignment of Errors.
9th. Writ of Error.
10th. Bond.
11th. Citation.

Said transcript to be made up in accordance with the rules of the United States Circuit Court of Appeals, for the Ninth Circuit.

J. H. COBB,
Attorney for Emery Valentine.

Filed in the District Court, District of Alaska, First Division, Feb. 11, 1916. J. W. Bell, Clerk. By L. E. Spray, Deputy.

[Certificate of Clerk, U. S. District Court to Transcript of Record.]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 72 pages of typewritten matter, numbered from 1 to 72, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, as per the praecipe of the plaintiff in error, on file herein and made a part hereof, in the cause wherein Emery Valentine is plaintiff in error and Charles A. Quackenbush, doing business under the firm name and style of the Juneau Construction Company, is defendant in error, No. 1153–A, as the same appears of record and on file in my office, and that the said record is by virtue of the Writ of Error and Citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to $31.65 has been paid to me by counsel for plaintiff in error.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled court this 14th day of February, 1916.

[Seal] J. W. BELL,
Clerk of the District Court for the District of Alaska,
First Division.

[Endorsed]: No. 2752. United States Circuit Court of Appeals for the Ninth Circuit. Emery Valentine, Plaintiff in Error, vs. Charles A. Quackenbush, Doing Business Under the Firm Name and Style of the Juneau Construction Company, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed February 29, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

NO. 2752

.... IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMERY VALENTINE,

Plaintiff in Error.

vs.

CHARLES A. QUACKENBUSH, Doing Business as the JUNEAU CONSTRUCTION CO.,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT FOR ALASKA, DIVISION NUMBER ONE

Brief for Plaintiff in Error

J. H. COBB,
Attorney for Plaintiff in Error.

ALASKA DAILY DISPATCH PRESS

NO. 2752

. . . . IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMERY VALENTINE,

Plaintiff in Error.

vs.

CHARLES A. QUACKENBUSH, Doing Business as the JUNEAU CONSTRUCTION CO.,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT FOR ALASKA, DIVISION NUMBER ONE

Brief for Plaintiff in Error

J. H. COBB,
Attorney for Plaintiff in Error.

ALASKA DAILY DISPATCH PRESS

STATEMENT OF THE CASE

This is an Action brought by the defendant in Error, hereinafter styled plaintiff, against the plaintiff in Error, hereinafter styled defendant, for a balance alleged to be due on a building contract. The contract was made between C. A. Quackenbush, T. A. Bush and R. J. Mill, a firm doing business as the Juneau Construction Co., and the defendant, on or about April 1st, 1913. Bush and Mill afterwards retired from the firm and the business was continued by plaintiff alone.

The plaintiff stated his cause of action as follows:

> "That between the 1st day of April, 1913, and the 1st day of April, 1914, the said Juneau Construction Company, at the special instance and request of the defendant, furnished to the defendant all of the lumber, materials, supplies and labor used (1½) in the erection and remodeling of three certain buildings belonging to the defendant in the town of Juneau, Alaska, and that the cost of said lumber, materials, supplies and labor was $27,931.59, and that the defendant herein agreed to pay to the said Juneau Construction Company the cost of said lumber, materials, supplies and labor used in the erec-

tion, construction and remodeling of said buildings and further agreed to pay to the Juneau Construction Company in addition thereto ten per cent (10%) of the cost of said lumber, materials, supplies and labor used in the erection, construction and remodeling of said buildings in compensation for the services of said Juneau Construction Company in Superintending the erection, construction and remodeling of the said buildings, and that the said Juneau Construction Company, did superintend the construction, erection and remodeling of said buildings, and that there was due to the said Juneau Construction Company on account of the said lumber, materials, supplies and labor used in the erection, construction an dremodeling of said buildings and on account of superintending the construction, erection and remodeling of said buildings $31,953.29.

II.

"That no part of the said sum of $31,953.29 has been paid except the sum of $26,774.32 and that there is now due and owing of and from the defendant to the plaintiff the sum of $5,020.92 with interest thereon at the rate of eight per cent (8%) per annum from April 1, 1914."

(Rec. p. 2)

The defendant's answer so far as material alleged:

"That on or about the 1st day of April, 1913, the defendant entered into a contract with the said plaintiff, Bush and Mill, under their partnership name of the Juneau Construction Company wherein and whereby the said Construction Co. undertook and agreed to superintend the erection of two certain buildings for defendant (4) in said town, according to plans then and there furnished said company by defendant, which buildings are the same as those mentioned in the complaint herein; that by the terms of said contract said company undertook to employ all needed labor at not to exceed the regular going wages in Juneau, and to purchase all needed material at the market price less the dealer's discount, which said company represented that it could and would obtain by virtue of the business in which it was engaged, and that said discount would more than equal the compensation stipulated for said company as hereinafter stated; that defendant should furnish the said company from time to time as needed and as the work progressed, the funds necessary to pay for said labor and material, and the said company agreed to keep an accurate account of all such moneys, and of all expenditures made therefrom and furnish the

same to defendant accompanied by original vouchers therefor; and it was further stipulated that said company should have and receive upon the completion of said work, a sum equal to ten per cent of the total cost of the labor and material employed, bought and paid for through it. That on or about November 1st, 1913, by a contract by and between plaintiff and defendant, plaintiff undertook the repairing and remodeling of a certain other building for defendant on the same terms and contditions as set forth in the first contract.

III.

"That after the said company had entered upon the performance of its said contract the said Bush and Mill retired from said firm (the precise date of which is unknown to defendant), and by some arrangement between themselves (the precise nature of which is unknown to defendant) plaintiff assumed all the duties and liabilities of said firm but the defendant never at any time released said partnership or any member thereof from any obligation to him under said contract.

"That between the 10th day of May, 1913, and the 15th day of January, 1914, both inclusive the defendant furnished the said company and plaintiff not only with the sum of $25,932.37

shown and (5) admitted in the bill of particulars filed herein, but in addition thereto with the further sum of $2,500.00 with which last-mentioned sum plaintiff failed to credit defendant, and making a total of $28,432.37 furnished and paid said company under said contract.

V.

"That upon the completion of the said work under said contract plaintiff demanded of the defendant the payment of a further sum of upwards of $6,000.00 for a balance alleged by plaintiff to be due him; that defendant was ready and willing to pay any balance actually due, and has at all times been so ready and willing, but he requested plaintiff give him a full account with original vouchers of the moneys he had received from defendant so that a correct balance could be struck, but the plaintiff failed and refused so to do, but did furnish defendant with copies, or purported copies of various bills and pay-rolls but incapable of verification, but which showed a purported balance due the plaintiff of upwards of $6,000; which sum defendant declined to pay, on the ground that the same was incorrect, contained many items wrongfully charged to the defendant, and was not accompanied by vouchers. The bill of particulars filed herein is a substantial copy of said

pretended account, except that by the addition and subtraction of various items and changed in the amounts of others the purported or claimed balance has been reduced.

VI.

"Referring to the bill of particulars filed herein defendant alleges that he is not liable for the items $539.40 "plan for block" or for any sum whatsoever therefore, for that the defendant did not furnish any such plan, and is not entitled to any charge therefore.

VII.

"Defendant further alleges upon information and belief, that the prices shown on the several accounts annexed to and contained in said bill of particulars, and the wages shown on the payrolls, are not the actual prices and wages paid by the plaintiff or said construction company, but in each instance represents a larger amount than was actually paid; but if the plaintiff or said construction company did pay the prices and wages therein shown, then defendant alleges that the amounts so paid were largely in excess of the amount for which said material could have been purchased, and said labor employed, and that plaintiff and the construction company wrongfully and intentionally increased the cost

of said work for the purpose of increasing the compensation they were to receive.

"Defendant further alleges that the material shown and charged to him in said bill of particulars is largely in excess of the material actually purchased and used by the said construction company and plaintiff in the prosecution of said work.

IX.

"That defendant has no means of ascertaining and stating the true and correct account between the construction company and himself under said contract, for the reason that all the material was purchased, and all the labor employed through said construction company and plaintiff, but he believes and therefore alleges that upon a true and correct statement of such account, including the compensation stipulated for the said construction company, a balance will be found in defendan't favor for a large sum."

(Record pp. 6-10.)

The reply so far as material alleged:

"Referring to paragraph II of said Affirmative Defense and Cross-Complaint, the plaintiff admits that on or about the 1st of April, 1913, the defendant entered into a contract with the plaintiff, Bush and Mill under their partner-

ship name of the Juneau Construction Company, wherein and whereby the said Construction Company, undertook and agreed to superintend the erection of two certain buildings for the Defendant in said town; denies 'according to the plans then and there furnished said company by defendant'; admits that by the terms of said contract the Juneau Construction Company undertook to (9) employ all needed labor at not to exceed the regular going wages in Juneau and to purchase all needed material at the market price less the dealer's discount which said company represented that it could and would obtain by virtue of the business in which it was engaged; denies that the plaintiff agreed that said discount would more than equal the compensation stipulated for the plaintiff as hereinafter stated; admits that it was agreed that the defendant should furnish the plaintiff from time to time as needed, and as the work progressed, funds necessary to pay for said labor and material and that said company agreed to keep an accurate account of all such moneys and all expenditures made therefrom and furnish the same to defendant accompanied by original vouchers therefor; admits that it was further stipulated that said company should have and receive upon the completion of said work a sum of money equal to ten per cent of the total cost of the labor and mater-

ial employed, bought, used and paid for by or through it or the defendant, and admits all the other allegations in said paragraph contained.

III.

"Referring to paragraph III. of said Affirmative Defense and Cross-Complaint, plaintiff admits that after the said company, the Juneau Construction Company, had entered upon the performance of its said contract that the said Bush and Mill retired from the firm and that the plaintiff assumed all of the duties and liabilities of the said firm; denies each and every other allegation therein contained and alleges the facts to be that the assumption by the plaintiff as the successor in interest of the said partnership of the obligations of the said contract with (10) the defendant was done with the full knowledge and consent of the defendant.

IV.

"Referring to paragraph IV., VI., VIII and IX. of the said Affirmative Defense, and Cross-complaint, the plaintiff denies each and every other allegation of fact therein contained.

V.

"Referring to paragraph V of said Affirmative Defense and Cross-complaint, the plaintiff

admits that upon the completion of the said work under the said contract, he demanded of the defendant the payment of a further sum of upwards of $6,000 as and for a balance due him; admits that the defendant requested plaintiff to furnish him a full account, with the original vouchers, of the moneys he had received from the defendant; admits that the same showed a balanec due the plaintiff from the defendant of upwards of $6,000 and denies each and every other allegation of fact therein contained.

VI.

'Referring to paragraph VIII. of said Affirmative Defense and Cross-complaint, the plaintiff admits that none of the sundry accounts therein referred to were paid for or through the Juneau Construction Company or the plaintiff, but denies each and every other 'allegation of fact therein contained.' "

It will thus be seen that all the terms of the contract as plead by the defendant **were admitted by the plaintiff** except the allegations: "according to plans then and there furnished said company by defendant," and "that the plaintiff denies said that discount (the dealers discount) would more than equal the compensation stipulated for plaintiff as hereinafter stated." These two allegations are denied, but all other allegations of defendant relat-

ing to the terms of the contract are admitted; and the two items denied became upon the trial, wholly immaterial, as we shall show.

The terms of the contract sued upon them were in sustance as follows:

1st. Plaintiff was to superintend the erection of two certain buildings and the repairing and remodeling of a third.

2nd. Plaintiff was to purchase all needed materials, and hire all labor.

3rd. Defendant was to advance the plaintiff from time to time as needed the necessary funds to pay for said material and labor.

4th. The plaintiff was to keep an accurate account of said moneys, and of all expenditures therefrom and furnish the same to defendant accompanied by original vouchers.

5th. Upon completion of said work the plaintiff was to receive as compensation for his services a sum equal to 10 per cent. of the total cost of the labor and material, employed, bought and paid through him.

This Is the Contract Admitted on the Pleadings

Upon the trial it developed and plaintiff admitted that defendant had paid the plaintiff $26,932.37 and the court so instructed the jury. (Rec. 67.) It further developed and the court so instructed the jury that there were overcharges to the defendant aggregating $766.83. (Rec. 64).

It further developed that the defendant had hired other independent contractors to put in the heating plant, the electric wiring, the painting, and paid for it directly and without supervision thereof by plaintiff; these independent contracts amounting to $5,617.20.

It further developed that plaintiff had charged defendant, in addition to the 10 per cent. stipulated in the contract, a further sum of 2½ per cent. for plans of building $666.82.

There was a trial to a jury which resulted in a verdict for plaintiff for $3,706.07, with interest from May 1st, 1914, (Rec. 16) upon which judgment was entered.

The defendant assigned errors, and sued out a writ of error to this court.

A bill of particulars, (not in the record because not material), was furnished by the plaintiff. On the trial, after correcting the credits which plaintiff had failed to give defendant for money advacned and after excluding as the court did, the erroneous charges, duplications, etc., aggregating $766,85, there was no serious controversy left except over two items, to-wit:

1st. A charge of $666.82 or 2½ per cent. on costs of building "for plans."

2nd. A charge of $561.82, being 10 per cent. on the aggregate cost of work done by independent

contractors, not superintended by plaintiff, and not within the terms of the contract.

3rd. Defendant further contends that the Court should not have allowed interest under the contract until a balance was ascertained and struck.

I.

The first point is raised by the First, Third, and Sixth Assignments of Error, which are as follows:

> "The Court erred in admitting in evidence the testimony of the plaintiff tending to show that the contract between the Juneau Construction Company and the plaintiff provided for a commission of 2½% of the cost of the Valentine building 'for plans' in addition to the 10% of such costs for the services of the said company.'

III.

> "The Court erred in refusing the prayer of the defendant to instruct the jury as follows:
>
> > 'In arriving at your verdict herein, you will wholly disregard the. charge made against Mr. Valentine by the plaintiff for $666.82 for plans of block. There is no evidence that the plaintiff expended any money or was put to any cost on account of such plans, and the 2½% on the total cost of the building, which the plaintiff claims he

was entitled to, to make up such item, is not embraced in the terms of the contract. ''

VI

''The Court erred in instructing the jury as follows:

'Plaintiff claims that in addition to his claim for material and labor, and for percentage thereon, he is entitled to 2½% on the cost of the new Valentine building for the work and labor of preparing plans for the work of construction. Plaintiff says that defendant agreed that the 2½% was a reasonable sum to charge for the plans, nad that it should be so charged, whereas the defendant claims that the contract was to the effect that if plaintiff did not do the work of building he was to have 2½% but if he did get the job of superintending the building, he was not to charge anything for the plans.' ''

'Now you have heard the evidence on both sides, and it is for you to decide from that evidence what the contract was as to the plans. If you decide that the contract was to pay 2½% of the cost of the building, including the 'sundry items' and allow that amount also to the plaintiff; if you decide that the contract was as Mr. Valentine al-

leges it to have been, then you will make no addition for or on account of the plans.' "

The bill of exception shows (Rec. pp. 60, and 66-67), that the defendant seasonably requested the instructions set out in the III Assignment and seasonably excepted to the instructions quoted in the VI. Assignment, and the request was refused.

The bill of exception further shows that the plaintiff testified, that he added 2½% per cent of the total cost of the building in addition to the 10 per cent. "for the plans'," that this was the usual and customary charge of architects for such services, and that defendant agreed to pay this 2½ per cent. as a part of the contract sued upon, and the defendant moved to strike all testimony relating to the plans and agreement to pay the 2½% per cent. which motion was denied, and defendant excepted. (Rec. 27, and 25-27).

ARGUMENT

In the first place it will be observed that the item of $666.82 is not an advance of money, made by the plaintiff which defendant was to repay. It is a part of his compensation for services under his contract with defendant. Is he entitled to it under the undisputed terms of his contract? Certainly there was, under the pleading no question raised, or issue made as to what plaintiff was to be paid.

It was 10 per cent. of the total cost of the work. The plaintiff plead it—the defendant plead it. The plaintiff testified as follows:

Q. Now, Mr. Quackenbush, if you are telling the jury the facts about that, when you drew your complaint herein why didn't you sue for 12½% per cent of the total cost of the building, under your alleged contract?

A. Because I was entitled to ten per cent of the total cost of the building.

Q. And 2½%, you say, for the plans?

A. Yes, sir.

Q. That makes 12½ per cent, doesn't it?

A. Yes, sir.

Q. Why didn't you sue for that? (27-13).

A. Well, itmake s a little different balance, I think. That ten per cent, that is for superintendence, and I am entitled to ten per cent for superintendence on every bit of work that I done and material furnished; and the 2½ per cent is much less than my other commission.

Q. You are charging 2½ per cent in addition, then, to the ten per cent you are charging on the work done and material furnished?

A. I am asking for 2½ per cent of the total cost of the Valentine building, not the old building. (Testimony of Charles A. Quackenbush).

Q. Answer the question—you are also

charging 2½ per cent in addition then to the 10 per cent?

A. Certainly—regular architect's fees.

Q. So in addition to the ten per cent of the total cost of the building so far as labor and material is concerned, you are charging Mr. Valentine 2½ per cent on your commission of ten per cent and adding it to the other, is that right?

A. That is for separate services altogether.

Q. Answer the question—is that what you are doing?

A. I charged Mr. Valentine, as I stated before, 2½ per cent for the plans of the Valentine block, and I am asking 10 per cent commission on the total work done.

Q. Does that ten per cent—the amount you calculate your 10 per cent on, include the cost of the plans?

A. It does not.

Q. Does the 2½ per cent you calculate for architect's plans, include your commission on the building?

A. Does it include—

Q. It is calculated on your 10 per cent commission as well as the other cost?

A. Certainly not. (28-14).

Q. What is it calculated upon?

A. It is calculated upon the net cost of the building, which is customary in architect's fees.

Q. Customary?

A. The world over, any place I have been.

The defendant testified that he furnished Mr. Mill (who was dead at the time of the trial) a set of plans of the building, and there were minor changes to be made, and Mill for the Construction Company agreed to make all such alterations, etc., and superintend the work for 10 per cent. If the Construction Company furnished plans alone, it was to charge 2½ per cent.

As this was an additional compensation sought to be received under the contract, the motion of the defendant to strike the testimony should have been granted; and the motion having been denied, the court should have instructed the jury to disregard it. The rulings of the court complained of, violate fundamental rules of law and proceedure. A plaintiff suing upon a contract, must recover according to the terms of the contract. He cannot add to it, by showing that an additional charge "is customary the world over." If he contracts for 10 per cent he cannot recover for 12½ per cent by showing that 2½ per cent is customary for a part of the services rendered. So if he sues upon and pleads a contract for 10 per cent compensation he cannot prove and recover upon a contract for 12½%. The allegata and Probata must agree. Much less can he admit the defendant's allegations that the contract for

compensation was 10 per cent, and prove 12½ per cent. His admission on the record estops him.

See 9 Cyc. 748-752, where these fundamental principles are clearly stated.

II.

The second point is raised by the IV. and V. Assignments which are as follows:

IV.

"The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

> 'You will also disregard the charge made against Mr. Valentine of $561.72 for 10% on sundry accounts, as that item is not within the terms of the contract as admitted by the plaintiff.' "

V.

The Court erred in instructing the jury as follows:

> 'Jlaintiff claims that the contract was that he should have a commission of 10% upon the total cost of the building; while defendant contends that the contract was that the plaintiff was only to have a commission of 10% upon such material and labor as was purchased and furnished by plaintiff, and defendant says that the ac-

counts called 'sundry items' (which you will find on page 2 of the bill of particulars) amounting to $5,617.20, are materials and labor not furnished by or through the plaintiff, and that plaintiff had nothing to do with them, but that the defendant transacted that business himself, and that plaintiff is not entitled to any commission thereon. Now you are the judges as to what this contract was. If you find from a preponderance of the evidence that plaintiff was to have 10% on the cost of those materials, labor, etc., furnished by him, and 10% on the value of the 'Sundry accounts'; but if you find that the contract was that he was only to have ten per cent on such material and labor as was furnished and supervised by him, the nyou must not allow him any percentage on the 'sundry items'—in other words, unless you find fro mthe preponderance of the evidence that the defendant Valentine agreed to pay to the Construction Company 10% upon the bills of the American Paint Co., Alaska Electric Light & Power Co., Juneau Iron Works, Marshal and Newman, and the Telephone Co., (65) (known as 'sundry accounts), you will allow no percentage thereon; That is to say, the question for you to determine is whether or

not the contract as made between the plaintiff and the Construction Co. provided for Valentine paying the Construction Co. 10% on these, 'sundry accounts,' and upon that issue the burden of proof is upon the plaintiff." (Rec. 71-72).

The bill of exception shows, (Rec. 60 and 66-67) that defendant seasonably requested the instruction quoted in the IV. Assignment, that it was refused and exception taken; that the court gave the instruction quoted in the V. Assignment and the defendant excepted.

It developed in the evidence, not in the pleading, that plaintiff was claiming $561.72 as a commission of 10% upon $5,617.20, the agregate of the cost of a heating plant, electric light plant, telephone wiring, and painting, all admittedly work done by other contractors, and paid for directly by the defendant—work which plaintiff was never employed to superintend or pay for. By the rulings of the Court complained of plaintiff was allowed to recover this item.

It is within the terms of his contract?

Defendant alleged (Rec. 6) that the Construction Company was to "receive upon the completion of said work, a sum equal to 10 per cent of the total cost of the labor and material, employed, bought and paid for through it." Defendant not only does not deny this allegation but admits it. (Rec. 12).

Yet the Court left it to the jury to say whether

or not the contract was that defendant was to pay this commission on work never superintended by plaintiff, never paid for by him ,and for which he was in no manner responsible. In short the court submitted to the jury an issue not only not made by the pleadings, but expressly excluded by the pleadings.

Grafton Hotel Co. vs. Walsh, 228 Fed. 7-10.

III.

The third point is raised by the VII and VIII. Assignments as follows:

VII.

"The Court erred in overruling the motion of the defendant to set aside the verdict, because contrary to and not authorized by the instructions of the Court in this; that the verdict allowed interest from May 1st, 1914. (66).

VIII.

"The Court erred in entering judgment on the verdict for interest from May 1st, 1914, because such allowance of interest is contrary to the law of Alaska in an action on mutual account until a balance is struck.

(Rec. 74).

The jury returned a verdict for the plaintiff for the sum of $3,706.07 with interest from the 1st day of May, 1914. (Rec. p. 16).

Upon this verdict a judgment was entered for $3,982.77.

This verdict and judgment was contrary or at least unauthorized by instructions of the Court (Rec. 67-68). It was also contrary to the law.

It is manifest from the record in this case that the defendant had advanced to the plaintiff a sum somewhat in excess of the moneys expended by the plaintiff in the prosecution of the work; that the plaintiff had failed to keep account of the expenditures of money advanced by the defendant as he was required under his contract, and had so conducted the accounting under his contract that he defendant could not settle any balance, if one existed, and until that balance was ascertained and struck the plaintiff was not entitled to interest.

Sec. 684, Complied Laws of Alaska provide:

> "The rate of interest in the District shall be eight per centum per annum on money due upon the settlement of mutual accounts from the date the balance is ascertained."

In conclusion we respectfully submit that the judgment should be resersed because:

1st. Under the contract plead the plaintiff was entitled to 10 per cent commission and not upon 12½ per cent commissions upon the cost of the Valentine building.

2nd. Because under the contract the plaintiff was entitled to commissions only upon the work

superintended by him and only to the extent of the cost of labor hired and materials purchased and paid for by him, and not upon the cost of incidental work done by independent contractors with which plaintiff had no connection.

3rd. Because the plaintiff was not entitled either under instructions of the court or under the law, to the interest allowed by the verdict and entered in the judgment; and we ask that the judgment be reversed and the cause remanded.

J. H. COBB,
Attorney for Plaintiff in Error.

No. 2752

United States
Circuit Court of Appeals
For the Ninth Circuit.

EMERY VALENTINE,

Plaintiff in Error,

vs.

CHARLES A. QUACKENBUSH, Doing Business Under the Firm Name and Style of THE JUNEAU CONSTRUCTION COMPANY,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Filed
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F. D. Monckton,
Clerk.

SHACKLEFORD & BAYLESS,
V. A. PAINE,
Attorneys for Defendant in Error.

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EMERY VALENTINE,

Plaintiff in Error,

vs.

CHARLES A. QUACKENBUSH, Doing Business Under the Firm Name and Style of THE JUNEAU CONSTRUCTION COMPANY,

Defendant in Error.

Brief of the Defendant in Error.

Three points are presented by the brief of the plaintiff in error, and they are as follows:

First: Error in admitting evidence and submitting to the jury the claim of 2½% for plans upon the Valentine Building;

Second: Alleged error of the Court in not refusing to allow 10% commission upon materials paid for directly by the plaintiff in error; and

Third: The allowance of interest from the 1st day of May, 1914, upon the judgment and verdict.

These various points will be discussed in the order above mentioned.

The plaintiff in error, defendant below, was the owner of certain real estate in the city of Juneau, and he entered into a contract with the defendant in error, plaintiff below, for the purpose of repairing and altering two of the buildings owned by him in the city of Juneau and for the further purpose of remodeling and practically building entirely anew another structure known as the Valentine

Building in the said city. The remodeling and the reconstruction of the Valentine Building was the largest job of the three; the other jobs were simply jobs of alteration and required no plans or architectural design with reference thereto.

The defendant in error employed one of the best architects in the city of Seattle, a Mr. Josenhaus, during this period of construction, and the defendant in error testified that it was definitely agreed in conversations with the plaintiff in error that 2½% should be allowed for the labor involved in drawing the plans for the remodeling of the Valentine Building (Tr. p. 26; Tr. p. 38).

The complaint alleged that the cost of lumber, materials, supplies and labor in the erection and remodeling of a certain building belonging to the defendant was $27,931.59 (Tr. p. 2). Upon the filing of the complaint the demand was made by the plaintiff in error for the filing of a bill of particulars. The present record is gotten up by the plaintiff in error as a short record, and the bill of particulars was omitted from the record. The defendant in error therefore suggests a diminution of the record, and has requested the clerk of the District Court for the First Judicial Division of Alaska to transmit to this court a certified copy of the first three pages of the bill of particulars, which has been transmitted, and under these circumstances we take it that the formal issuance of a writ of certiorari for diminution will not be necessary, but that an order may be entered which cannot be objected to by

either side, allowing the consideration of the certified copy of the bill of particulars.

At the bottom of page 2 of the certified copy of the bill of particulars is the charge $666.82 for the plans for the Valentine Block, so that when the case was tried and evidence introduced tending to show that the plaintiff in error had agreed with the defendant in error to pay 2½% additional for the plans on the Valentine Block, there could have been no element of surprise, and the allegations of the complaint as to the cost of remodeling the building together with the item in the bill of particulars clearly brought the allowance for the making of plans within the scope of the pleadings, and the Court properly admitted the evidence and submitted the issue to the jury.

The allegations of paragraph VI of the answer of the plaintiff in error show clearly that the issue as to the plans for the block was comprised in the pleadings and anticipated when the answer was drawn. Paragraph VI of the answer reads as follows:

> "Referring to the bill of particulars filed herein defendant alleges that he is not liable for the items $539.40 'plan for block' or for any sum whatsoever therefor, for that the defendant did not furnish any such plan, and is not entitled to any charge therefor."

It is apparent, therefore, that the evidence upon the question as to whether the defendant in error had agreed to pay 2½% for the plan was submitted

to the jury, and that the evidence was in conflict with the verdict of the jury, which was in favor of the defendant in error and thus settled this issue.

The second point raised by the plaintiff in error is that five bills for materials, to wit: American Paint Company, Alaska Electric Light and Power Company, Juneau Iron Works, Marshall and Newman and Juneau Telephone Company, were paid directly by the plaintiff in error and not through the defendant in error as a contractor, and therefore the 10% commission which was agreed upon as a proper commission for the builder should not have been computed on any of the items paid directly by the defendant in error.

The testimony of the defendant in error (Tr. p. 30) showed that he had a conversation with the plaintiff in error in May, 1913, in which the terms of the contract were stated. The conversation was had in the jewelry store of the plaintiff in error, and that among other things the plaintiff in error stated that he had agreed to pay 10% on the total cost of the building. This was denied by the plaintiff in error, and this question was submitted to the jury under proper instructions by the Court and the jury found against the plaintiff in error. It was a matter of disputed testimony, as appears from the record, and it is perfectly reasonable to assume that the theory of the defendant in error was perfectly correct, otherwise it would only be necessary to diminish the compensation of the contractor to an unreasonable minimum if the owner of the property saw fit to pay all of the bills directly instead of through the contractor. The statements of the

plaintiff in error with reference to the agreement are hardly believable, but, as we have said before, it was a matter of dispute in the testimony and was submitted to the jury, whose verdict was against the plaintiff in error.

The third point is that it is claimed that the Court erred in allowing interest under the verdict in its judgment. The verdict (Tr. p. 16) shows that the interest was allowed by the jury under a form submitted by the Court to the jury. There is no record showing any objection to the form of verdict at the time of its submission. There is nothing to show that the judgment was objected to upon the ground that the interest should not have been allowed. There is nothing to show that any of the questions discussed in the brief of plaintiff in error were presented in the motion for new trial. The motion for new trial is not in the record, and it must therefore be presumed that the questions which the plaintiff in error seeks to raise upon this appeal were not presented at the right time and in the proper form. The present suit was a suit brought to recover the commissions of the building contractor together with the disbursements made by the building contractor for the use and benefit of the plaintiff in error. It alleged that a certain amount had been expended and that there was due from the defendant in error to the plaintiff in error the sum of $5,000, with interest from the 1st day of April, 1914, and alleged failure and refusal of the plaintiff in error to pay the amount due and a demand upon the account. There is nothing in the record which shows the account was an open mutual account, simply an account for services and disbursements upon certain particu-

lar work described in the complaint upon which there had been credited certain payments made by the owner of the building, plaintiff in error. The balance due from the plaintiff in error to the defendant in error has been held back by the plaintiff in error since the 1st day of April, 1914. It will soon be three years, and we suggest that a careful examination of the record in the present case shows that the appeal is purely and simply for the purpose of delay, and that there is no color of merit to any of the three claims presented by the plaintiff in error, and that therefore the judgment of this case should be affirmed.

Respectfully submitted,
SHACKLEFORD & BAYLESS,
V. A. PAINE,
Attorneys for Defendant in Error.